

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,)
)
 Plaintiff,) Case No. CR 16-21
) Milwaukee, Wisconsin
 vs.)
) December 12, 2018
) 1:00 p.m.
 SAMY M. HAMZEH,)
)
 Defendant.)

TRANSCRIPT OF SPOILIATION HEARING
BEFORE THE HONORABLE WILLIAM E. DUFFIN
UNITED STATES MAGISTRATE JUDGE

U.S. Official Reporter: JOHN T. SCHINDHELM, RMR, CRR,
Transcript Orders: WWW.JOHNSCHINDHELM.COM

Proceedings recorded by computerized stenography,
transcript produced by computer aided transcription.

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1 P R O C E E D I N G S (1:01 p.m.)

2 THE COURT: Please be seated.

3 THE CLERK: Judge Duffin is present for the United
4 States of America vs. Samy Mohammed Hamzeh, Case No. 16-CR-21,
01:01 5 here for a spoliation hearing. May I have the appearances,
6 please, first by the government?

7 MR. PTASHKIN: Good afternoon, Your Honor. Adam
8 Ptashkin with AUSA Ben Taibleson from the United States, along
9 with Special Agent Jessica Krueger.

01:01 10 THE COURT: Good afternoon to you all.

11 MR. ALBEE: Good afternoon, Your Honor. Samy Hamzeh
12 appears in person with Joe Bugni and Craig Albee as his
13 attorneys. Also present at counsel table is Shavon Caygill, our
14 paralegal.

01:02 15 THE COURT: Good afternoon to you.

16 Well, we're here for a spoliation hearing. Let me
17 kind of recap where things are.

18 Back on March 8th, I issued an order that certain
19 information be produced from the government to the defendant
01:02 20 that was followed up with a motion for a spoliation hearing from
21 the defense on July 11th, 2018, which motion I granted on July
22 25th, 2018 as part of an order that also -- you know, just
23 identified issues that were going to be addressed.

24 And both the government and the defense have since
01:03 25 produced -- or recently produced or filed memorandum kind of in

1 anticipation of this afternoon's hearing. So I guess the -- so
2 the purpose initially, and principally, is to discuss the
3 spoliation issue.

4 It looks like, at least from the document filed by the
01:03 5 defense yesterday, there is also -- they also want to have a
6 dialog about documents or information that they had requested
7 and that I've ordered produced that they say hasn't been
8 produced.

9 So let me start with you, Mr. Albee, how would you
01:03 10 like to proceed here?

11 MR. ALBEE: Well, Judge, I think the Court's
12 accurately summarized some of the issues here.

13 We do view this as a spoliation hearing. But I think
14 relevant to that issue is the fact that text messages and
01:04 15 information relating to text messages still hasn't been
16 produced. And so, I mean, we think that's tied into the
17 spoliation hearing. And the reason -- I think there's a need to
18 find out the reasons why things haven't been produced and then
19 to determine whether that's excusable in some way and what
01:04 20 sanctions, if any, should be imposed.

21 The government, I understand, has a witness that was
22 identified in its submission last week to the Court who is
23 available to testify regarding what took place and why Agent
24 Adkins' text messages were not preserved.

01:05 25 So my understanding is the government's prepared to

1 proceed by calling him as a witness, and may have another
2 witness or two regarding why text messages haven't been
3 recovered.

4 Also, we've asked that certain agents be available to
01:05 5 ask them questions about why certain things weren't preserved.

6 I guess, in addition to texts, there also are
7 questions about the failure to preserve or turn over emails.
8 We've had 11 pages turned over. I don't know that that's the
9 whole universe of emails in this case either.

01:05 10 But if we could -- so my proposal, Judge, is to
11 proceed with the government calling its witnesses, and then
12 we're likely to call an agent or two if the government doesn't
13 call them to help establish their own case here.

14 There were a couple of -- yesterday we received a
01:06 15 letter from the government regarding Department of Justice
16 policy regarding the preservation of e-communications which
17 we've marked as Exhibit H. I'd like to submit that I guess at
18 this time, as well as what we've prepared as Exhibit N which is
19 a complete list of the text messages that have been produced --
01:06 20 is that correct? -- a complete list of the text messages that
21 have been produced by the government.

22 So I can provide the government with copies of those.
23 We've obviously received both of these -- both of these
24 documents from the government.

01:06 25 THE COURT: All right. Any objection?

1 MR. PTASHKIN: No objection, Your Honor.

2 THE COURT: All right. Mr. Ptashkin, does that make
3 sense, to proceed with the government going first? It seems
4 like that makes sense to me.

01:06 5 MR. PTASHKIN: Absolutely, Your Honor. And so, just
6 to give a quick preview, the United States has three witnesses.
7 The defendant requested that we make three additional special
8 agents available. We've made them available, they're here and
9 ready to be questioned. So I would anticipate I guess the
01:07 10 hearing's going to be six witnesses.

11 The other thing I just wanted to briefly address,
12 which was discussed in our briefing is, from the United States'
13 perspective, based on the sixth pretrial motion for spoliation
14 hearing the defendant filed, this hearing is about text messages
01:07 15 in the fall of 2015 to spring of 2016, and the preservation and
16 deletion of those text messages.

17 And so the United States, as it did in its briefing,
18 just wants to front to this issue. The United States is going
19 to be objecting to any questions to the agents that go outside
01:07 20 the scope of this hearing in terms of its limited text message
21 preservation/deletion from the fall 2015, to spring of 2016.

22 And obviously this is a sensitive issue because this
23 is a opportunity for the defendant to potentially examine our
24 witnesses about the substance of the case that have absolutely
01:08 25 nothing to do with spoliation. The United States is going to

1 object to that as outside the scope of the hearing.

2 THE COURT: I agree that -- Mr. Albee, you can be
3 heard, if you would speak into the microphone but -- that the
4 purpose of today's hearing is to discuss spoliation issues.

01:08 5 MR. ALBEE: I agree.

6 THE COURT: All right. And you're I'm assuming
7 standing because you're going to give those to --

8 MR. ALBEE: I was going to provide --

9 THE COURT: Pass those up? Sure. Go ahead.

01:08 10 MR. ALBEE: Exhibits H and Exhibit N.

11 THE COURT: All right. Thank you. All right.

12 Mr. Ptashkin, why don't you call your first witness.

13 MR. PTASHKIN: Thank you, Your Honor. At this time
14 the United States calls Joshua Baer.

01:09 15 THE CLERK: Remain standing. Please raise your right
16 hand.

17 JOSHUA BAER, GOVERNMENT WITNESS, DULY SWORN

18 THE CLERK: Please state your full name and spell your
19 last name for the record.

01:09 20 THE WITNESS: Joshua Robert Baer. Last name spelled
21 B-a-e-r.

22 THE CLERK: You can be seated.

23 DIRECT EXAMINATION

24 BY MR. PTASHKIN:

01:10 25 Q. Thank you so much for being here today, Mr. Baer. Where do

1 you currently work?

2 A. I work for the Counterintelligence Division of the FBI, at
3 the J. Edgar Hoover Building.

4 Q. Is that the FBI headquarters on Pennsylvania Avenue in DC?

01:10 5 A. Yes, sir.

6 Q. And what is your precise position with the FBI currently
7 within the Counterintelligence Division?

8 A. I'm a management and program analyst.

9 MR. ALBEE: I'm sorry, could you speak up?

01:10 10 THE WITNESS: Oh, I do apologize. Is that better?

11 MR. ALBEE: It is.

12 THE WITNESS: Thank you.

13 I'm a management and program analyst.

14 BY MR. PTASHKIN:

01:10 15 Q. Okay. And what is the Counterintelligence Division?

16 A. They're the component that oversees investigations for
17 counterintelligence/counterespionage across the U.S.

18 Q. And broadly at a 10,000-foot level, what's your job
19 description?

01:10 20 A. So currently I oversee a small program and support
21 counterintelligence investigations.

22 Q. What's the total length of time you worked for the FBI?

23 A. About eight years now.

24 Q. What was your job in -- from about the fall of 2015 until
01:11 25 spring 2016?

1 A. I was an analyst for the FBI's intelligence and risk
2 analysis unit.

3 Q. And have you also previously been a contractor for the
4 Department of Energy?

01:11 5 A. Yes, sir.

6 Q. And where were you stationed for that job?

7 A. Los Alamos National Lab.

8 Q. In New Mexico?

9 A. Yes.

01:11 10 Q. What was your job there, broadly speaking?

11 A. I was a laboratory assistant.

12 Q. Okay. Are you familiar with the IT infrastructure of the
13 FBI?

14 A. Yes, very much so. For the past year I was an information
01:11 15 technology specialist with the Enterprise Security Operation
16 Center in the FBI.

17 Q. You mentioned this Enterprise Security Operation Center, is
18 the acronym for that ESOC?

19 A. Yes, sir.

01:12 20 Q. What is ESOC?

21 A. It is the network defense component for the FBI. So
22 defending FBI IT infrastructure against external actors
23 attempting to compromise the networks, as well as potentially
24 malicious actors inside misusing that same infrastructure.

01:12 25 Q. Okay. drawing your attention to roughly October 2015 until

1 April of 2016, during that time period was it standard for FBI
2 special agents to be provided with a government-issued cellular
3 telephone?

4 A. Yes.

01:12 5 Q. Do these cell phones have the ability to send text messages?

6 A. Yes.

7 Q. What, if any, software was placed on these FBI-issued cell
8 phones before they're issued to the agents in order to retain
9 text message content?

01:12 10 A. So the FBI uses a commercial off-the-shelf product called
11 Steel Talon to log a variety of datasets on the cell phones to
12 include text messages.

13 Q. And when -- again, when is that text retention software
14 installed on the FBI cell phone? Before the SA receives them?

01:13 15 A. Yes. So at the time that the phone is first being handed
16 out to anyone, a variety of different security software pieces
17 would be installed.

18 Q. Okay.

19 A. Including this one.

01:13 20 Q. And so the software that's on the cell phone before the SA
21 receives it, who installs that software?

22 A. Generally that's the field office information technology
23 specialist or specialists.

24 Q. Okay. What does the installation process require? And when

01:13 25 I say that, I guess I'm asking: Are there a series of precise

1 steps that need to be followed by the installer?

2 A. Yes. It's a fairly lengthy manual process. Because as I
3 mentioned, there are several pieces of software that are
4 installed at any -- at that time. So the process needs to be
01:13 5 followed very closely otherwise that can cause problems with the
6 log-in software.

7 Q. So, a little more specifically, what effect could it have on
8 text retention if the installer doesn't follow this series of
9 steps precisely?

01:14 10 A. It could immediately or over a period of time negatively
11 impact that logging software's capability to collect those text
12 messages.

13 Q. And let's talk about when the software's functioning
14 100 percent. What does the text message retention software do
01:14 15 with text message content?

16 A. So, in general, what it does is it attempts to take a
17 snapshot of the text message at the time that it is either being
18 sent or received. So it will add additional data, metadata
19 associated with the transit of that message, as well as attempt
01:14 20 to capture the body of the text message.

21 Q. Okay. And what, if anything, can negatively affect the
22 ability of the software to function properly? We've already
23 discussed this precise installation process --

24 A. Uh-huh.

01:15 25 Q. What other -- what, if anything, else can negatively impact

1 that software?

2 A. Well, it's important to understand that this piece of
3 software is an application on the phone. So that means that the
4 hardware of the phone itself, sort of the most basic piece, if
01:15 5 there's a problem with its ability to send or receive data, that
6 can negatively impact the quality of the logging.

7 There is the phone operating system. So, Android or,
8 you know, IOS -- in the FBI's case that's all Android, and that
9 sort of regulates how the phones are able to operate. Then the
01:15 10 software itself and the way the pieces of software interact with
11 each other. And then the logging software itself.

12 So there are multiple layers where if any of those
13 cause -- any of those layers cause a conflict, that can
14 negatively impact the logging software.

01:16 15 Q. Has the software provider that provides this software that's
16 installed on the FBI phone, have they ever acknowledged bugs in
17 the software?

18 A. Yes. There were bugs -- there have been bugs, for example,
19 in the 2015-2016 timeframe as well.

01:16 20 Q. What does the FBI's manual provisioning process and update
21 schedule, what does that mean?

22 A. So essentially what that means is that every time there's a
23 new phone -- so be it a technology refresh, you know, moving to
24 a new generation of cell phone, reissuing a phone if someone
01:16 25 loses it, it's destroyed -- all of that requires that field

1 information technology specialist to go through that precise
2 series of steps in order to install that logging software and
3 make that phone able to access FBI information technology
4 resources.

01:17 5 Q. What, if any, negative effect can software updates have on
6 the ability of the software to collect or transfer text messages
7 from an agent's phone?

8 A. Quite a few. The two main areas would be both the operating
9 system of the cell phone -- because that regulates how all other
01:17 10 pieces of software interact with that cell phone.

11 So the ability to make copies of text message content
12 is entirely inherent on the operating system allowing that. If
13 there's an update and the way that the operating system
14 functions with that capability, that can cause a -- that can
01:17 15 negatively impact the logging software's ability to actually
16 collect that information until a new patch is developed and
17 deployed. Same thing, for example, with the text message
18 generation software.

19 Q. Okay. Directing your attention again to this October 2015
01:18 20 until April 2016 time period, did Special Agent Jonathan Adkins
21 from the Milwaukee division, did his phone during that time
22 period have this text retention software installed on it?

23 A. Yes, it did.

24 Q. And was it installed on his phone prior to the fall of 2015?

01:18 25 A. Yes, it appears to have been.

1 Q. Okay. Was there a retention gap on Special Agent Adkins'
2 FBI-issued phone during this October 2015 to April 2016 time
3 period?

4 A. Yes, it appears that there was a gap in the logging.

01:18 5 Q. What caused this gap?

6 A. Unfortunately I don't have any specific knowledge of what
7 did. Just as we had kind of gone over previously, there are
8 multiple possibilities of what could have caused that gap, be it
9 a fault in the provisioning process, network connectivity
01:18 10 errors, software updates, or even a bug in the software, the
11 logging software itself.

12 Q. Okay. What, if any, possibility is there that a special
13 agent could have prevented the retention of Special Agent
14 Adkins' text message via the software?

01:19 15 A. Via the logging software there is no way that I know of that
16 an agent could influence that capability.

17 Q. Is it physically even possible for Special Agent Adkins or
18 another agent to interact with the text retention software
19 that's on their cellular phone?

01:19 20 A. No. So it has multiple layers of protection, including the
21 inability to modify or uninstall that software.

22 Q. And during this October 2015 to April 2016 time period, is
23 it -- was it physically possible for Special Agent Adkins or any
24 other special agent to disable the text retention software?

01:19 25 A. No. As I mentioned, the software itself is protected

1 through multiple layers.

2 Q. One last question along that line. Is it physically
3 possible for the special agent to not completely disable but
4 partially inhibit the software on their cellular phone?

01:20 5 A. Not in any way that I'm aware of.

6 Q. What, if any, outages did the FBI text retention system
7 experience? And again, going back to this fall 2015 to spring
8 2016 time period.

9 A. There were a decent percentage of the FBI cell phones
01:20 10 experienced --

11 MR. ALBEE: I'm sorry, a what percentage?

12 THE WITNESS: A decent percentage. So a precise
13 number is still being determined, but the -- these phones
14 were -- had a complete or partial loss of that logging
01:20 15 capability during that time period.

16 MR. PTASHKIN: Your Honor, I apologize, I would just
17 request that if Mr. Albee has a question for the witness he wait
18 till he's cross-examining the witness as opposed to asking him
19 directly during my examination.

01:21 20 THE COURT: Well, he's not really asking him
21 questions. He's just not hearing him clearly, just like
22 Mr. Schindhelm asked him to clear up something that he said.
23 And I don't think that's unfair for him to do that.

24 MR. PTASHKIN: I apologize, Your Honor.

01:21 25 BY MR. PTASHKIN:

1 Q. So were these outages 100 percent of this October-to-April
2 time period, or was it intermittent?

01:21

3 A. It was intermittent. Depending on, again, the factors that
4 influenced why that phone created the logging gaps in the first
5 place.

6 Q. And does the FBI know what caused these outages or does it
7 relate to your earlier answer where it could have been any one
8 of those?

01:21

9 A. Right, there was sort of a confluence of events during that
10 time period, and at that point there were any number of things
11 that could have impacted them. So the outcome appears the same,
12 but the root causes can be very diverse.

13 Q. Is there any -- does the FBI have any information that
14 Special Agent Adkins caused the nationwide outages?

01:22

15 A. None whatsoever.

16 Q. And could these retention outages, can they randomly stop
17 and start or is it always down for a specific amount of time?

01:22

18 A. They can stop and restart again. As the operating system
19 and softwares are being updated and changed, again, something
20 may stop for a period of time, restart, or just be stopped until
21 further notice.

22 Q. And in 2015 and 2016, what, if any, warning did special
23 agents receive that these retention outages were occurring on
24 their cell phones?

01:22

25 A. There was no warning that I'm aware of.

1 Q. When the service providers for FBI cell phones -- whether
2 that's Sprint, Verizon, AT&T, or some other service provider,
3 when they update their operating system what if any effect could
4 that have on the text retention software the FBI installs on the
01:23 5 phones?

6 A. Well, as I mentioned earlier, that is sort of the most basic
7 layer of software. So that regulates how every other piece of
8 software on the phone operates.

9 So if -- you know, the -- if that operating system
01:23 10 update restricts the ability to access a piece of information,
11 it changes that format and that can cause other pieces of
12 software down the line to stop functioning in part or in whole.

13 Q. With regard -- what is time-stamping for a text message?

14 A. So that would -- essentially that would just mean that
01:23 15 whenever -- whichever piece of information is being generated
16 there is a stamp -- a time associated with that. So some
17 providers will timestamp the send and receive times. It could
18 also be failure times. Time-stamping is sort of just
19 associating time with an event or a piece of information.

01:24 20 Q. And so, not to get into the specifics of the differences
21 between the different providers, but just by way of example,
22 AT&T and Verizon and others providers, they have different
23 methods of how they time and date stamp their text messages and
24 phone calls; is that accurate?

01:24 25 A. Uh-huh, yes.

1 Q. In regards to phone calls, is the time-stamping, is the
2 length of the call, the way they measure the length of the call
3 and report it on their logs, is that different between service
4 providers too?

01:24 5 A. That may be. Again, the service providers are generally
6 logging that for billing purposes. So the precise reasons why
7 they are creating timestamps would dictate sort of the accuracy
8 and when those begin and end.

9 Q. Again, not specific to any one specific provider, but
01:24 10 Sprint, Verizon, AT&T, other cell phone providers, do some of
11 them time and date stamp their texts in a manner that differs
12 from the FBI's own internal time-stamping?

13 A. Absolutely. I mean, again, they are time-stamping this
14 information for their purposes. The FBI's logging software is
01:25 15 time-stamping that at the point where it is either being
16 generated or something like that. So the -- there could be very
17 distinct differences, within a couple seconds to a couple
18 minutes, depending on the purposes.

19 Q. One last series of questions about cell service providers.

01:25 20 In regards to text messages. When they give a log of
21 the text messages, do they sometimes break long text messages
22 into multiple messages in their call logs because of the length?

23 A. Generally, so. The general industry standard is 140
24 characters.

01:25 25 Q. So I guess what that means is, if a text is over 140

1 characters in the service provider's log of texts, it's going to
2 appear as if it was more than one text message even though it
3 was only one text message.

4 A. Precisely. They generally do that for billing purposes.

01:26 5 MR. PTASHKIN: Thanks so much again for being here
6 today, Mr. Baer.

7 No further questions at this time, Your Honor.

8 THE COURT: Mr. Albee?

9 MR. ALBEE: Yes.

01:26 10 CROSS-EXAMINATION

11 BY MR. ALBEE:

12 Q. You were speaking a little fast so I didn't catch. I
13 understand you had a certain position from fall of 2015 until,
14 was it September 2016?

01:26 15 A. So that position would have been inclusive of 2015, through
16 early 2017, with the -- where I was with the Intelligence and
17 the Risk Analysis Unit with the FBI.

18 Q. All right. And in that role, what responsibilities did you
19 have with regard to I guess looking at the collection of text
01:26 20 messages from FBI agents?

21 A. So with that role there was no component of that. But when
22 I was with the Enterprise Security Operation Center, or ESOC,
23 from 2017 through actually just a couple weeks ago, my job
24 was -- I was the program manager for the program that oversaw
01:27 25 data collections for the ESOC, which included text messages in

1 this case.

2 Q. Okay. And when were you first asked to get involved in this
3 case?

01:27 4 A. Let's see. This would have been a few months ago. I don't
5 know precisely when.

6 Q. And at that time what were you asked to do?

7 A. Simply discuss the FBI's text message collection
8 infrastructure as owned by the Enterprise Security Operations
9 Center, to give a full understanding of how that operates and
01:28 10 what might cause a text message to appear or not appear.

11 Q. Were you asked to obtain Agent Adkins' texts?

12 A. My program was, yes.

13 Q. Your program was?

14 A. Yes. The Enterprise Security Operation Center was requested
01:28 15 to do that.

16 Q. All right. And when was that?

17 A. I don't have the precise date, but that would have been mid
18 2018.

19 Q. And your understanding is that somebody else was asked to
01:28 20 try to locate Agent Adkins' texts.

21 A. Precisely. There's a standard procedure for providing text
22 messages for discovery purposes.

23 Q. Were you asked -- or I guess I should say was your program
24 asked to obtain texts for other agents relating to this
01:28 25 investigation?

1 A. I believe so.

2 Q. Are you able to tell me which agents those were or would you
3 have any documents that would tell us that?

4 A. Yes. The original discovery request probably would have
01:29 5 included that.

6 Q. And do you have that?

7 A. I do not, no.

8 Q. And so what is your understanding as to what someone else in
9 your program did in terms of trying to search for Agent Adkins'
01:29 10 text messages?

11 A. So these text messages are placed in a centralized database
12 where they are searched according to the parameters provided.
13 Most generally it will be a cell phone or a username, in which
14 case the -- and sometimes a date range as well.

01:29 15 So at that point all data matching those criteria are
16 provided to the requester, generally a local counsel for a field
17 office.

18 Q. And do you know what was searched in this case? Was it the
19 cell phone or the username, or what was it?

01:30 20 A. I believe it was the cell phone.

21 Q. Does it ever occur that these software glitches or problems
22 with the operating system, whatever causes the problem with
23 preservation, does that ever on occasion cause calls to not be
24 preserved under the right call -- right cell phone or username?

01:30 25 A. So this would only be through the logging itself. I'm not

1 aware of any circumstances where it would have the information
2 attached to a different user or username.

3 Q. Would you be able to potentially find more information by
4 also searching for content or phone numbers?

01:30 5 A. I'm sorry. I don't quite understand.

6 Q. So it sounds like you looked for texts associated with a
7 particular cell phone, or somebody in your program did, correct?

8 A. Uh-huh, yes.

9 Q. So could you also have searched for in this case Mr. Hamzeh,
01:31 10 Samy, could you have searched for his name, would that have
11 potentially located other texts that hadn't been I guess
12 downloaded in connection with the cell phone?

13 A. I'm honestly not certain about that.

14 Q. And you're not aware of any effort to try to search through
01:31 15 other -- looking to find other phone numbers or particular names
16 in this case, or the informants' or the agents' names, those
17 kind of things?

18 A. I'm not aware of that, but that may have gone through the
19 standard procedures.

01:31 20 Q. What did you review, Mr. Baer, in preparation for testifying
21 today?

22 A. The FBI -- the ESOC's procedures for collecting these text
23 messages to ensure that I had a accurate understanding of the
24 process, as well as the -- double-checking the steps that the
01:32 25 ESOC took during this time period, before my departure.

1 Q. Was there a report on that?

2 A. No.

3 Q. In what way did you double-check?

4 A. I mean, so this would have been simply reviewing the emails
01:32 5 and what was provided for the text messages.

6 MR. ALBEE: Your Honor, I'd move for production of the
7 items that Mr. Baer reviewed in preparation for his testimony.

8 MR. PTASHKIN: Your Honor, I guess I'm -- so
9 essentially, we're talking about I guess an email request from a
01:33 10 field office to ESOC requesting that this search of the text
11 message retention system be done? I mean, I guess I'm unclear
12 on what Mr. Albee wants us to produce.

13 THE COURT: Yeah, it's not clear to me what exactly
14 you're asking for, Mr. Albee.

01:33 15 MR. ALBEE: I'm sorry, Judge.

16 THE COURT: It's not clear to me what you're asking
17 for.

18 MR. ALBEE: So he reviewed at least the ESOC's
19 procedures for collecting or searching for these -- this
01:33 20 information, so we're moving for that.

21 And then the emails I think are relevant to when these
22 searches were undertaken and may contain other information. But
23 he used them -- he did review them in preparation for his
24 testimony.

01:33 25 THE COURT: All right. Well, I will take it under

1 consideration.

2 BY MR. ALBEE:

3 Q. And did you write any report about this matter, Mr. Baer?

4 A. No.

01:34 5 Q. And you're aware that there's a policy that requires FBI
6 agents to preserve text messages?

7 A. Yes.

8 Q. When did the FBI become aware of the problem preserving
9 text messages?

01:34 10 A. This would have been in 2016, I believe.

11 Q. Do you know what month in 2016?

12 A. Unfortunately, I do not.

13 Q. And has that problem been fixed?

14 A. The FBI has been working on that and addressing that issue.

01:34 15 Q. So it has not been --

16 MR. PTASHKIN: Your Honor, objection. Again, I'd
17 respectfully submit the scope of the hearing is fall of 2015 to
18 spring of 2016. So what's going on in 2018 is irrelevant to the
19 scope of the hearing.

01:34 20 THE COURT: Sustained.

21 BY MR. ALBEE:

22 Q. You understand Mr. Adkins to have an Android phone?

23 A. Yes.

24 Q. When did the FBI begin using Android phones?

01:35 25 A. This would have been 2014, I believe.

1 Q. All right. You had testified on direct to the effect that
2 Mr. Adkins had had some problems with his phone and the
3 preservation of the text messages?

4 A. I mean, under the -- yes. In the fact -- insofar as they
01:35 5 were not text messages that were captured between October 2015
6 and April 2016.

7 Q. When were individual offices or agents told that there was a
8 problem capturing these text messages?

9 A. I'm not aware of any specific communication to that.

01:36 10 Q. Now, there are other ways to preserve text messages besides
11 through this system?

12 A. I believe so, but I'm not aware of the specifics of that.

13 Q. I mean, you could simply take a screen capture of your text
14 messages for one, correct?

01:36 15 A. Unfortunately, the actual preservation of text messages is
16 not something I deal with.

17 Q. You have a cell phone. Right?

18 A. Yes, sir.

19 Q. And you know you can take a screen capture of your text
01:36 20 messages.

21 A. Yes.

22 Q. And so agents in the Milwaukee office presumably could have
23 done the same at the time, correct?

24 A. Once again, I'm not aware of any guidance about that.

01:37 25 Q. They could have written a report where they verbatim

1 memorialized what was in the text messages, correct?

2 A. Again, I'm not familiar with what the process is that would
3 have been involved in this.

4 Q. Well, I mean, you know that you could look at a text message
01:37 5 and write down what it says and then it would be preserved what
6 information came through on that text, right?

7 A. I mean, again, my -- yes, it is possible to write something
8 with a pen.

9 Q. You could -- you're aware that for a period of time the
01:37 10 phone company maintains what text messages have been sent and
11 received, correct?

12 A. Yes.

13 Q. You could get those from the phone company too, right?

14 A. I'm not aware of what precise circumstances are required to
01:37 15 get the text messages from phone companies.

16 Q. You indicated that a decent percentage of phones were
17 afflicted with this problem?

18 A. Uh-huh.

19 Q. Yes?

01:38 20 A. Yes.

21 Q. Can you give me a percentage?

22 A. The precise number is still being identified, but 10 percent
23 or greater.

24 Q. So there is a significant number of text messages that are
01:38 25 being sent or received by FBI agents that aren't being preserved

1 as required by policy.

2 MR. PTASHKIN: Objection. It really calls for
3 speculation. There hasn't been a foundation laid that this
4 witness knows anything about how agents nationwide are
01:38 5 preserving their text messages, outside of this text retention
6 system.

7 THE COURT: Sustained.

8 BY MR. ALBEE:

9 Q. If the agents are relying on this text retention system, a
01:38 10 significant amount of text messages aren't being preserved,
11 correct?

12 THE COURT: At that time.

13 MR. ALBEE: At that time.

14 THE WITNESS: I'm not familiar with how they -- how
01:39 15 they would rely on that, on that system, but if the system is
16 not collecting something that text message would not be
17 collected by the system.

18 BY MR. ALBEE:

19 Q. Are you aware of other ways in which agents at that time
01:39 20 were preserving their text messages?

21 A. No, I'm not.

22 Q. Was there some guidance from the agency as to what they
23 should be doing because their text retention system was not
24 working properly?

01:39 25 A. I am not aware of any of that guidance.

1 Q. Did the software problems also afflict the security of the
2 telephones?

3 MR. PTASHKIN: Objection, Your Honor. I'm not sure of
4 the relevance of the security of FBI's systems in regard to a
01:39 5 hearing on text retention and preservation.

6 MR. ALBEE: I think it goes to what kind of response
7 the FBI had to these problems and when they were aware of them.

8 THE COURT: Why is that relevant?

9 MR. ALBEE: Well, I think in terms of -- I mean,
01:40 10 there's -- as Exhibit H indicates, there was a requirement that
11 these be preserved. If the FBI is aware of problems and is
12 doing nothing to resolve those problems, that goes to their
13 violation of the policy and their failure to preserve evidence
14 in a criminal case.

01:40 15 THE COURT: The objection is sustained.

16 BY MR. ALBEE:

17 Q. All right. Did you or anyone with your program make an
18 effort to obtain Mr. Adkins' phones?

19 A. I or my program, I am not aware of any attempts to obtain
01:40 20 his phone.

21 Q. All right. And you're aware that information including
22 texts can be obtained from the phone directly, true?

23 A. Yes.

24 Q. Cellebrite is one program that's often used to obtain text
01:40 25 messages?

1 A. Yes, Cellebrite is one program used.

2 Q. And you have no knowledge of anybody trying to do that with
3 Agent Adkins' phone.

4 A. My complete -- my intersection with this case has been
01:41 5 solely about the FBI's logging system and infrastructure, so I
6 am not aware of anything.

7 Q. Would there be other methods for trying to obtain the text
8 messages that appear not to have been preserved that weren't
9 utilized in this case?

01:41 10 A. Again, I don't know what was or what is possible in this
11 case.

12 Q. Okay. I mean, let's say that the agency was aware that a
13 text message was of enormous importance, either for a
14 prosecution or for a life-and-death matter, and you weren't
01:41 15 finding the texts or it appeared to have been not preserved for
16 the same reasons as is in Mr. Adkins' case. What additional
17 steps would the FBI take to try to find that crucial text?

18 MR. PTASHKIN: Your Honor, objection. This question
19 strikes me as being asked and answered, and it also calls for --
01:42 20 somewhat calls for speculation on Mr. Baer's part.

21 THE COURT: Overruled.

22 THE WITNESS: I'm sorry, sir, can you please repeat
23 that question?

24 BY MR. ALBEE:

01:42 25 Q. Yeah. If this text was deemed absolutely crucial by the

1 FBI, whether it would prove a case or it was a life-and-death
2 matter and you really needed to find a past text, what other
3 steps could be taken?

4 A. So from the -- again, this is outside of my wheelhouse, but
01:42 5 contacting the service provider, for one.

6 And, yeah, I mean, unfortunately, the process of
7 actually collecting the text messages outside of the system is
8 not something that I have any real understanding of insofar as
9 the FBI's capabilities or procedures.

01:43 10 Q. Okay. And I'm not trying to be critical, you're not the guy
11 that they would go to to see how to try to find that text
12 through a different method.

13 A. Correct. Correct.

14 Q. I presume you and probably everybody else in the FBI is
01:43 15 familiar with the situation with Special Agent Strzok and Lisa
16 Page?

17 A. A little bit, yes.

18 Q. And you're aware that in that case there were tens of
19 thousands of missing texts. That was widely reported, correct?

01:43 20 A. I have seen the news, yes.

21 Q. All right. And after that was reported then a number of
22 texts were actually recovered, right?

23 A. Um, I believe so, yes.

24 Q. The Office of the Inspector General was able to obtain many
01:44 25 of the missing texts.

1 A. Uh-huh.

2 Q. Yes?

3 A. Yes, I believe that was what happened in this case.

4 Q. All right. How were those texts recovered in that case?

01:44 5 A. My understanding is that they contacted an outside party to
6 collect the information. But again, I was not specifically
7 involved with the recovery of those text messages.

8 Q. So your understanding is that there were additional methods
9 that an outside party was able to bring to bear to find the
01:44 10 texts.

11 A. Again, this would be only through what I've seen through the
12 news.

13 Q. And in this case no one contacted an outside party to try to
14 locate Agent Adkins' missing texts or the missing texts of the
01:44 15 other agents in this investigation.

16 A. Once again, that is not anything that I have any insight
17 into.

18 Q. As far as you know, nobody did make a contact to an outside
19 agency here.

01:45 20 A. I'm sorry.

21 MR. PTASHKIN: Objection. Asked and answered.

22 THE COURT: Sustained.

23 BY MR. ALBEE:

24 Q. Were you asked to look for any emails for Agent Adkins or
01:45 25 the other agents in this case?

1 A. That would have gone through the standard discovery
2 procedure, which the ESOC does not handle the email portion of
3 discovery.

4 Q. Who does handle the email?

01:45 5 A. I believe the Office of General Counsel.

6 Q. Is it your understanding all those emails are preserved or
7 supposed to be preserved just as texts are?

8 MR. PTASHKIN: Your Honor, objection. There's been no
9 foundation laid that this is within an IT specialist's area of
01:46 10 expertise. This sounds like a question for FBI General
11 Counsel's office almost.

12 THE COURT: He's asking for his knowledge. Maybe he
13 doesn't have any, but -- overruled.

14 THE WITNESS: I'm sorry, sir, could you please repeat
01:46 15 that question?

16 BY MR. ALBEE:

17 Q. Sure. Is it your understanding that the Office of General
18 Counsel then would preserve text messages -- preserve emails --
19 or attempt to preserve emails just as your former program would
01:46 20 attempt to preserve text messages?

21 A. I believe that they would try to acquire the communications.
22 But the preservation of that, I don't have any specific
23 knowledge into the ways and means of emails.

24 Q. Did your program -- or any other program to your
01:46 25 knowledge -- make any effort to examine individual agents'

1 phones to try to determine the source of the problem?

2 A. My program did not. However, the -- I'm not aware of what
3 other programs in the FBI may have done.

01:47

4 Q. Had you heard of those efforts being undertaken to try to
5 solve the issue here?

6 A. Again, I'm not familiar with what would have been done
7 specifically.

01:47

8 Q. Setting aside whether the actual text message is preserved,
9 is there a log that's maintained or available showing how many
10 text messages that agent sent or received?

01:48

11 A. Again, the specific logging that I would be aware of -- I'm
12 aware of would be the software that in this case failed to
13 collect those text messages. So, again, the specific logging
14 for this wouldn't have shown whether a text message was sent or
15 received.

16 Q. Your office wouldn't have available to it if the -- if there
17 was the software glitch -- a list of the texting that occurred
18 from, in this instance, Agent Adkins.

01:48

19 A. Again, if it's -- the software is failing it's not providing
20 that information.

21 Q. And do you know whether texts are maintained for task force
22 agents who aren't employees of the FBI?

23 A. It would depend on if they are provided an FBI-issued cell
24 phone.

01:49

25 And I should clarify that that would be through my

1 former program, whether they're preserved in that manner.

2 Q. You were asked a few questions about differences in
3 timestamps.

4 A. Uh-huh.

01:49 5 Q. Could you explain to me what you're talking about?

6 A. Essentially, that depending on what piece of software is
7 generating the timestamp, those can have a -- they can show
8 different times.

9 So essentially, if you have different pieces of
01:49 10 software they may be using slightly different clocks or slightly
11 different begin and end points to actually generate those
12 timestamps. So you can end up having discrepancies between two
13 different pieces of -- two different datasets when describing
14 the same thing.

01:49 15 Q. And you have no reason to question the records maintained by
16 these different telephone companies, Verizon, AT&T, Sprint?

17 A. I mean, again, the -- I'm not aware of the specific criteria
18 that they use for generating the timestamp, but I do not have
19 any reason to question the accuracy of that timestamp.

01:50 20 Q. And if there are these discrepancies, you said -- you gave
21 the example of a couple seconds to a couple minutes.

22 A. Generally so, yes.

23 Q. And with a phone call, you might have an instance where if
24 somebody put down the time of the phone call its beginning and

01:50 25 someone else put down its end, you would definitely have a

1 discrepancy there, correct?

2 A. Yes. I mean --

3 Q. That would be -- there would be either no discrepancy or
4 less significant discrepancy when it came to text messages.

01:50 5 A. Potentially so. I mean, again, it depends on what the
6 specific criteria are involved with generating that timestamp.

7 MR. ALBEE: That's all.

8 THE COURT: Before you ask follow-up, Mr. Ptashkin,
9 let me ask Agent Baer a couple questions.

01:51 10 EXAMINATION

11 BY THE COURT:

12 Q. This logging software that you indicated had to be installed
13 properly and there was a procedure that if it wasn't installed
14 properly it could create problems, have you personally ever
01:52 15 installed the logging software?

16 A. No, I have not.

17 Q. Do you know the steps that are involved in installing the
18 logging software?

19 A. At a high level I'm aware of the steps, yes.

01:52 20 Q. What do you know at the level that you're familiar with?

21 A. I've gone through the process. Essentially the ITS -- the
22 information technology specialist involved would take the phone,
23 install the security software, logging software, and then begin
24 linking that phone to different FBI databases and ability to,
01:52 25 say, connect to email.

1 Q. Okay. And if -- where is the potential for that person to
2 do it incorrectly?

3 A. Well, so the security software itself restricts how other
4 pieces of software can request information from the cell phone.

01:53 5 So if the logging software is installed in an improper
6 sequence with the security software, the security software can
7 actually create blocks in the logging software's ability to
8 access information on that phone.

9 Q. So what problems does that create?

01:53 10 A. So what that can create is either a complete failure to
11 collect information, or over time as the -- that can also create
12 a buildup effect as different pieces of that software become
13 disconnected from their normal function.

14 Q. Okay.

01:53 15 THE COURT: Mr. Ptashkin?

16 MR. PTASHKIN: Thank you, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. PTASHKIN:

19 Q. Just a few quick questions.

01:53 20 So ESOC was not able to recover -- there was a
21 retention gap and thus ESOC was not able to recover some of
22 Special Agent Adkins' text messages from the text retention
23 system.

24 A. Correct.

01:54 25 Q. So if the text messages were not able to be recovered

1 because they were never stored in the system, that means any
2 hypothetical search that is -- could have happened by say the
3 defendants' name or something, it can't find messages that were
4 never stored in the system to begin with.

01:54 5 A. That is actually very correct in that if the text messages
6 were not being collected and sent by the phones, then that
7 information would not have made it into the system.

8 Q. Is there anything ESOC could have done to find these -- the
9 messages that were not retained by the software for Special
01:54 10 Agent Adkins that hasn't been done?

11 A. I mean, again, the software -- the software collects what it
12 collects. And at the point where it is collected and stored,
13 you know, at that point we have a high confidence that what has
14 been collected and stored is accurate from that collection. But
01:55 15 if there were gaps for any phone sending that information, that
16 simply would not have made its way into the system.

17 Q. Is Cellebrite one of the standard tools for doing a forensic
18 exam on a cell phone?

19 A. Yes. Cellebrite is considered to be kind of the standard in
01:55 20 many cases.

21 Q. Do you know if service providers sometimes timestamp things
22 using different time zones?

23 A. I know that they can. But, again, the specifics of what
24 dataset is actually being requested is actually something that I
01:55 25 don't know in that case.

1 Q. Okay. And so -- one last question. What's your level of
2 certainty that between October 2015-April 2016 Special Agent
3 Adkins was not able to disable the text retention software on
4 his phone?

01:56 5 A. Very confident.

6 MR. PTASHKIN: Thanks so much again for being here
7 today. No further questions, Your Honor.

8 THE COURT: Mr. Albee, anything else?

9 RECCROSS-EXAMINATION

01:56 10 BY MR. ALBEE:

11 Q. Mr. Baer, you were just asked whether there was anything
12 else ESOC could have done, right? Do you remember that
13 question?

14 A. Well, yes. Anything else that my program could have done,
01:56 15 yes.

16 Q. But as you indicated in the Strzok case, somebody else was
17 contacted to take a look at the records in those cases, right?
18 In that case?

19 A. That would have been a matter of the FBI, IB, DOJ, OIG in
01:56 20 that instance.

21 Q. And as a result of that referral, additional texts were
22 obtained, correct?

23 A. That's my understanding, yes.

24 Q. Presumably there could have been a referral in this case as
01:56 25 well to have somebody with more insight to look for the texts.

1 A. I'm not aware of what precisely would have been required in
2 that case.

3 Q. If phone records are stamped or are -- I guess if the
4 records relate to one particular time zone, it's not too
01:57 5 difficult to convert them to another time zone that's relevant?
6 Correct?

7 A. (No response.)

8 Q. I mean, if you have a Greenwich Mean Time record, you can
9 figure out how many hours to deduct to have it be Eastern Time,
01:57 10 Central Time, Mountain Time or Pacific Time.

11 A. Yes. I mean, dealing with time zones is something that
12 could be done, yes.

13 Q. And I apologize if I've asked this, but Mr. Bugni thinks I
14 did not. Did you determine whether the glitch affected the
01:57 15 other agents' phones who have missing texts?

16 A. In this case the precise reasons for anything are something
17 that we don't understand. Or I should say we understand sort of
18 the spectrum of what could occur on FBI cell phones in general,
19 but whether a specific phone is exhibiting a logging gap is not
01:58 20 something that is readily apparent because it appears the exact
21 same as if a phone is turned off as a logging gap.

22 Q. And I take it that if there was a software glitch that
23 affected the phone and was preventing texts from being
24 preserved, that that would either apply to all texts at the time
01:59 25 or none of the texts during the relevant time?

1 A. That is actually not the case in the sense that as I
2 described earlier it can be an intermittent problem. So you can
3 actually have very short-term gaps, for example, in an area of
4 poor cell reception. Or, you know, a variety of other issues
01:59 5 can cause a very short-term or very long-term gap.

6 Q. I take it though there'd be no reason why if I texted you 10
7 times and I texted Mr. Ptashkin 10 times, that only my texts to
8 you would be preserved and not the ones to Mr. Ptashkin.

9 A. Again, without knowing the specifics of what was going on
02:00 10 with the logging at that time, I couldn't say. But there are
11 conceivably reasons why that would happen, again, depending on
12 geographic location of different people, the status of their
13 logging software, et cetera.

14 Q. Well, if I'm the one sending the texts, it would -- the --
02:00 15 it would relate to my phone, correct? The records would relate
16 to my phone.

17 A. Yes.

18 Q. And so if I sent Mr. Ptashkin a text right now and you a
19 text right now --

02:00 20 MR. PTASHKIN: Your Honor, objection because the
21 question is asking for speculation about something that's
22 physically impossible. A phone can't send texts to two people
23 simultaneously. And the agent -- Mr. Baer's already testified
24 this is intermittent so it could affect one text message and
02:00 25 then not affect the text message that was sent directly after

1 it.

2 THE COURT: Overruled.

3 BY MR. ALBEE:

02:01 4 Q. So maybe I don't mean exactly simultaneously. But, you
5 know, if I sent you one right now, immediately after sending it
6 to Mr. Ptashkin, immediately after that sent you one,
7 immediately after that sent to Mr. Ptashkin. There would be no
8 good reason why the ones to you would be preserved and the ones
9 to Mr. Ptashkin would not. And they all happened within a
02:01 10 10-second period of time and I'm at this location the whole
11 time.

12 A. Yeah, I mean, unfortunately, without knowing the specifics I
13 couldn't answer that definitively.

14 MR. ALBEE: That's all. Thank you.

02:01 15 THE WITNESS: Thank you.

16 THE COURT: Is that it?

17 MR. PTASHKIN: I guess one other question.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. PTASHKIN:

02:01 20 Q. Mr. Albee asked you questions about these text message
21 recovery that are -- I guess newspapers have reported are
22 related to the current events and a couple specific agents,
23 right?

24 A. Uh-huh.

02:01 25 Q. You indicated earlier your entire knowledge of that recovery

1 process is based on newspaper reports, right?

2 A. So my program is at the periphery; however, the DOJ Office
3 of Inspector General was the component that performed the text
4 message recovery efforts in this case. In that case I should
02:02 5 say.

6 Q. And so you weren't involved in that.

7 A. I did not work on collecting or finding those text messages.

8 MR. PTASHKIN: No further questions. Thank you.

9 FURTHER RECROSS-EXAMINATION

02:02 10 BY MR. ALBEE:

11 Q. Well, and for that matter you didn't personally collect the
12 text messages or try to collect the text messages in this case,
13 correct?

14 A. Correct. I was not involved in that either.

02:02 15 Q. In each case you're relying on -- to give your statement
16 you're relying on information you heard from someone else.

17 A. Yes.

18 MR. ALBEE: Thank you.

19 THE COURT: All right. Thank you.

02:02 20 THE WITNESS: Yes, sir.

21 THE COURT: You can step down.

22 (Witness excused at 2:02 p.m.)

23 THE COURT: Mr. Ptashkin?

24 MR. PTASHKIN: Your Honor, the United States now calls
02:02 25 Special Agent Neil Lee.

1 THE CLERK: Please raise your right hand.

2 NEIL LEE, GOVERNMENT WITNESS, DULY SWORN

3 THE CLERK: Please state your full name and spell it
4 for the record.

02:03 5 THE WITNESS: Neil Lee, N-e-i-l, L-e-e.

6 THE COURT: You may be seated.

7 THE WITNESS: Thank you.

8 DIRECT EXAMINATION

9 BY MR. PTASHKIN:

02:03 10 Q. Thank you for being here today, Mr. Lee. Where do you
11 currently work?

12 A. I work for the FBI in Milwaukee.

13 Q. What's your position with the FBI?

14 A. I'm a special agent and I'm a CART forensic examiner. CART
02:04 15 stands for Computer Analysis Response Team.

16 Q. Broadly speaking, what's your -- what are your job
17 responsibilities as a CART examiner?

18 A. I review digital evidence, mainly computers, cell phones,
19 tablets. Things of that nature.

02:04 20 Q. What's the length of time you've worked at the FBI?

21 A. Just over 11 years.

22 Q. What types of crimes have you examined in those --
23 decade-plus?

24 A. I've worked gangs and drugs, cyber matters, and now CART.

02:04 25 Q. Broadly speaking, what types of cyber matters have you

1 investigated?

2 A. Computer intrusion, internet fraud.

3 Q. To a layman like me, what is a forensic exam of a cell
4 phone?

02:04 5 A. So we take a cell phone and we extract the data from the
6 cell phone in a forensically sound manner.

7 Q. And is a physical examination kind of a synonym for forensic
8 exam?

9 A. It's one type, yes.

02:05 10 Q. Ballpark, not precise, what's the number of phones or
11 computers you have performed a forensic exam on over the course
12 of your decade-plus, approximately?

13 A. Approximately hundreds. Maybe thousands.

14 Q. Directing your attention to the summer of 2018, did you
02:05 15 receive a request to do a forensic examination on a FBI-issued
16 cell phone that previously belonged to Special Agent Jonathan
17 Adkins?

18 A. Yes, I did.

19 Q. How did you receive the phone?

02:05 20 A. I received it via FedEx from our headquarters office.

21 Q. Headquarters in DC?

22 A. Yes, Washington, DC.

23 Q. Did you attempt to recover text messages off of Special
24 Agent Adkins' government-issued phone?

02:05 25 A. Yes, I did.

1 Q. What type of exam did you perform on the phone?

2 A. I attempted a physical extraction on the phone.

3 Q. Were you able to recover -- what were you able to recover
4 from the physical extraction?

02:06 5 A. I was not able to recover anything from the physical
6 extraction.

7 Q. And that includes you weren't able to recover any text
8 messages.

9 A. Yes, that's correct.

02:06 10 Q. What type of physical extraction tool did you use to do
11 this?

12 A. In this particular case it was Cellebrite UFED.

13 Q. Is that one of the standard tools the FBI uses to perform
14 physical extractions?

02:06 15 A. Yes.

16 Q. And is that a tool you regularly used over the course of
17 your career?

18 A. Yes.

19 Q. What is a factory reset?

02:06 20 A. It's a setting on your phone that once you enable it it
21 resets the phone to the state that it was once it left the
22 original manufacturing location.

23 Q. And so when a factory reset occurs does that essentially
24 take all the data that had been put on the phone and erase it?

02:07 25 A. It makes it unrecoverable because it's getting it ready for

1 the next user.

2 Q. What if any other procedure technologies could you have used
3 to attempt to recover text messages from Special Agent Adkins'
4 phone?

02:07 5 A. As far as in this situation I've tried every tool or
6 technique that I'm aware of that could recover text messages on
7 the phone.

8 Q. When an FBI special agent gets a new phone -- I mean a new
9 model of the same phone or a new phone for any reason, what
02:07 10 typically happens to the old cell phone?

11 A. It's common for the phone that's being turned in to be
12 factory reset for security reasons.

13 MR. PTASHKIN: Thank you so much for being here,
14 Special Agent Lee.

02:08 15 No further questions at this time, Your Honor.

16 THE COURT: Mr. Albee?

17 CROSS-EXAMINATION

18 BY MR. ALBEE:

19 Q. Good afternoon.

02:08 20 A. Good afternoon.

21 Q. When is it that you were asked to conduct this forensic
22 examination of Agent Adkins' cell phone?

23 A. I believe it was in the May-June timeframe of this past
24 year, 2018.

02:08 25 Q. And you said you received it -- it was delivered to you from

1 DC, the DC office.

2 A. Yes, that's correct.

3 Q. And I take it it was in DC because Mr. Adkins had stopped
4 using that phone at some time in the past.

02:08 5 A. I couldn't say. I don't know what -- where it was before
6 that.

7 Q. All right. I mean, when it was in DC before it came to you,
8 Agent Adkins wasn't using it at that time, correct?

9 A. Correct.

02:09 10 Q. And do you know when he stopped using that phone?

11 A. I don't.

12 Q. I presume that like with all government agencies there's a
13 lot of recordkeeping when people -- when FBI personnel get new
14 equipment like a cell phone? Are records kept of that?

02:09 15 A. Is your question are there records when an agent gets a new
16 phone or turns in --

17 Q. Correct. I'll start with when an agent gets a new phone.
18 Is there a record created of that?

19 A. I don't know for sure. I couldn't say positively.

02:09 20 Q. Do you have an FBI-issued cell phone?

21 A. Yes, I do.

22 Q. And there are requirements for you to maintain good care of
23 that cell phone?

24 A. Yes.

02:10 25 Q. I mean, and at some point you're expected to turn that phone

1 in, correct?

2 A. Yes.

3 Q. And they'll maintain an inventory of when you received the
4 phone and when you turned it in, right?

02:10 5 A. Yes.

6 Q. And that would be true for Agent Adkins presumably -- Adkins
7 as well, too.

8 A. I would believe so, yes.

9 Q. And so can you tell me when he turned in that phone that you
02:10 10 received and examined?

11 A. I don't know.

12 Q. Is that information you're able to obtain?

13 A. That's not information that I would have.

14 Q. All right. And it was your understanding that the phone you
02:10 15 examined had been subject to a factory reset?

16 A. Yes.

17 Q. And is that something you were -- that you're able to
18 determine through Cellebrite and looking at the phone?

19 A. Yes.

02:11 20 Q. Had you also been told that?

21 A. I discussed it with our folks who handle our cell phones.

22 Q. And they told you it had been subject to a factory reset?

23 A. Yes.

24 Q. Now, you're aware that it's FBI policy to preserve all text
02:11 25 messages with witnesses?

1 A. Yes.

2 Q. And this is supposed to happen automatically?

3 A. That I don't know.

02:11 4 Q. One way in which you could preserve text messages is by
5 doing screenshots?

6 A. That's a possibility, yes.

7 Q. Do you know whether the phone company keeps records for a
8 time of the content of text messages?

9 A. That I don't know.

02:11 10 Q. An agent also could write down or memorialize in some other
11 fashion exactly what text messages he's received from a
12 particular witness, correct?

13 A. Yes.

14 Q. Are there other ways in which text messages could be
02:12 15 preserved?

16 A. I'm sure there are. Yep.

17 Q. Were you asked to examine the cell phone for Agent Fraser?

18 A. No, I was not.

19 Q. Were you asked to examine the phone of Agent Zuraw?

02:12 20 A. Yes.

21 Q. And are you the one that produced the Cellebrite report in
22 this case?

23 A. I would have to -- which Cellebrite report are you referring
24 to?

02:13 25 Q. Let me show you what's been marked as Exhibit C. And I'll

1 invite your attention to the back of the exhibit to the area
2 labeled, "Extraction Report." Just take a glance at that.

3 (Witness peruses documents.)

4 A. This report doesn't look familiar to me.

02:14 5 BY MR. ALBEE:

6 Q. Okay. And can you tell me why it doesn't look familiar to
7 you? Or what looks different from the Cellebrite report that
8 you might have prepared in this case?

9 A. So this does look like a Cellebrite report. I don't believe
02:14 10 this was a report I did though.

11 Q. And why not?

12 A. Because it doesn't look familiar to me.

13 Q. What would be different on the report that you prepared as
14 you recall it?

02:14 15 A. Usually on reports that I generate there is usually a cover
16 page where there is a spot for the examiner name, and I don't
17 see that here.

18 MR. ALBEE: Your Honor, if I could just have a moment
19 to talk to counsel.

02:15 20 THE COURT: Go ahead.

21 (Counsel confer.)

22 BY MR. ALBEE:

23 Q. You did prepare a Cellebrite report of your examination of
24 Agent Zuraw's phone?

02:15 25 A. So, to answer your question, I don't believe I generated

1 this report and I don't believe I examined -- this was a result
2 of my examination.

3 Q. I'm sorry, I don't understand what you're saying.

4 A. So you asked me earlier if I examined Agent Zuraw's phone?

02:16 5 Q. Yeah.

6 A. I believe not only did I examine Agent Zuraw's phone, but I
7 also believe one of my colleagues examined and I believe this
8 was the report from that examination.

9 Q. Okay. And who is the colleague who examined the phone?

02:16 10 A. I believe it was Special Agent Matthew Peterson, who is no
11 longer with the FBI.

12 Q. All right. And then you did your own Cellebrite
13 examination.

14 A. I did not. I was asked to review the extraction that he had
02:16 15 conducted, Special Agent Peterson had conducted, and make
16 available all the text messages to make sure that everything was
17 indeed provided.

18 Q. Well, just so I'm clear, is there another report that you
19 put together or not?

02:16 20 A. There was another report I generated I wanna say a couple
21 days ago, but I'm not sure if it was related to this matter, for
22 Agent Zuraw's phone.

23 Q. Were there any other phones you were asked to examine in
24 connection with this case for any other agents?

02:17 25 A. No.

1 Q. All right. I think the agents would be Fraser, Buono
2 Simmons -- and what's the other? Mosback.

3 A. No.

4 Q. And when was it that you reviewed Special Agent Peterson's
5 work on the Zuraw phone?

6 A. This past week.

7 Q. Were you able to tell when the factory reset had occurred?

8 A. For --

9 Q. For Agent Adkins' phone?

10 A. I was not, no.

11 Q. And why wouldn't you be able to make that determination?

12 A. There aren't any artifacts for me to make that
13 determination.

14 Q. On the Cellebrite report that was prepared with respect to
02:19 15 Agent Zuraw's phone, is it your understanding that these texts
16 were still on the phone? That is, were these deleted texts or
17 not deleted or not --

18 A. I couldn't say based off of this report alone.

19 Q. Do you recall from your review of the information from
02:19 20 Agent Peterson?

21 A. Based on my review I would -- it did not -- I do not recall
22 them being deleted. I believe they were still active.

23 Q. This Cellebrite report shows a couple hundred texts relating
24 to CHS-1. There was also a CHS-2 in this case. Would there be
02:20 25 any reason why Cellebrite would capture only the texts from

1 CHS-1 and not CHS-2?

2 A. Without knowing more of the facts I would be speculating.

3 Q. And as far as you know, is Agent Zuraw's phone still
4 available to determine whether there are texts to CHS-2?

02:20 5 A. I believe so.

6 Q. Were you asked to look whether there were any texts between
7 agents themselves?

8 A. I don't believe I was.

9 Q. I assume that the FBI could get phone records for its agents
02:21 10 from the telephone company as with any other phone?

11 A. I would believe so. I'm not 100 percent certain. I would
12 think so.

13 Q. And are you aware of any effort to do that in this case, to
14 determine how many text messages were made from the agents?

02:21 15 A. I don't know for sure.

16 Q. Are emails from FBI agents or to FBI agents preserved?

17 A. I believe so, yes.

18 Q. Were you asked to recover emails in this case?

19 A. I was not, no.

02:21 20 Q. Do you know, is that phone for Agent Zuraw, is that
21 FBI-issued?

22 A. I don't believe it is.

23 Q. Just one last question, I think. How long do agents usually
24 have their phones, or is there a usually?

02:22 25 A. It varies depending on the technology of the phone. There's

1 no set time period.

2 Q. It's not like you get a replacement every year or every two
3 years, something like that?

4 A. I believe it's worked out to be about every couple years,
02:22 5 but I don't believe it's set that way. I think it's depending
6 on the technology that comes out and the needs of the bureau as
7 far as what's been researched for security purposes.

8 Q. And I guess I do have one more question. The Cellebrite
9 analysis you did earlier this week relating to Agent Zuraw's
02:23 10 phone, I take it you still have that information available if it
11 does relate to this case so that it could be produced?

12 A. Yes.

13 MR. ALBEE: Thank you.

14 MR. PTASHKIN: No further questions, Your Honor.

02:23 15 THE COURT: Mr. Albee, you're done as well?

16 MR. ALBEE: Yes.

17 THE COURT: All right. Thank you, sir. You can step
18 down.

19 THE WITNESS: Thank you, sir.

02:23 20 (Witness excused at 2:23 p.m.)

21 THE COURT: The government can call its next witness.

22 MR. PTASHKIN: Intelligence for one minute,
23 Your Honor.

24 THE COURT: No problem.

02:23 25 (Brief pause.)

1 MR. PTASHKIN: Your Honor, at this time that concludes
2 the government's witnesses for this hearing.

3 THE COURT: All right. Mr. Albee?

4 MR. ALBEE: We'd like to call Agent Adkins.

02:24 5 THE COURT: Okay.

6 JONATHAN ADKINS, GOVERNMENT WITNESS, DULY SWORN

7 THE CLERK: Please state your full name and spell it
8 for the record.

9 THE WITNESS: Jonathan Todd Adkins, J-o-n-a-t-h-a-n,
02:25 10 T-o-d-d, A-d-k-i-n-s.

11 THE COURT: Have a seat.

12 THE WITNESS: Thank you.

13 DIRECT EXAMINATION

14 BY MR. ALBEE:

02:25 15 Q. Good afternoon.

16 A. Good afternoon.

17 Q. Mr. Adkins, what do you do for a living?

18 A. I'm an FBI agent.

19 Q. And you're in the Milwaukee office?

02:25 20 A. I am.

21 Q. How long have you been in the Milwaukee office?

22 A. Since 2012.

23 Q. And you're involved in the investigation of Samy Hamzeh?

24 A. That's correct.

02:25 25 Q. Were you considered the lead case agent?

1 A. Yes.

2 Q. That is, the other agents in the case reported to you or
3 took your directions in this case?

02:25 4 A. I'd like to think of myself as the co-case agent. There
5 were two of us that were lead agents.

6 Q. And who was the other co-case agent?

7 A. Joe Zuraw.

8 Q. And he's not an FBI agent; is that right?

9 A. That's correct.

02:26 10 Q. Who does he work for?

11 A. He works for Customs and Border Protection.

12 Q. All right. And so in this case you also -- as co-case agent
13 you reviewed the work of others in the case?

14 A. I did.

02:26 15 Q. You reviewed their reports?

16 A. I did.

17 Q. Did you have occasion to review their text messages?

18 A. I did not.

19 Q. Have you reviewed their text messages at any time?

02:26 20 A. No.

21 Q. And did you give instructions to the agents about this
22 investigation?

23 A. What do you mean by "instructions"?

02:26 24 Q. During -- I presume that during the course of the
25 investigation you gave them instructions as to what you wanted

1 them to do, what you didn't want them to do, what they could not
2 do.

3 A. That's correct.

4 Q. Did you give them instructions about text messages?

02:27 5 A. No.

6 Q. Did you give the informants in this case instructions about
7 text messages?

8 A. Yes.

9 Q. And what were the instructions you gave the informants in
02:27 10 this case?

11 A. That we were not to do any substantive case conversations
12 via texts; that it was all to be in person.

13 Q. And did you convey those instructions to the fellow agents
14 who were working on the case?

02:27 15 A. That's correct.

16 Q. And you say you haven't reviewed the texts so you don't know
17 whether those instructions were violated or not.

18 A. That's correct.

19 Q. You're aware that text messages between witnesses or
02:27 20 prospective witnesses and agents are required to be preserved?

21 A. That's correct.

22 Q. You had -- have you seen the list of text messages that you
23 had with -- we'll call him CHS-2, we'll call him Mike -- have
24 you seen the list prepared by the defense of the number of text
02:28 25 messages you had with Mike?

1 A. I have reviewed that list.

2 Q. Does that number of text messages during that period of time
3 seem consistent with what you remember at the time?

4 A. Yeah, I would say so. I've reviewed them and it's
02:28 5 consistent with how I operate when I operate with an informant.

6 Q. Okay. It's not as though you felt like I never texted with
7 him or I texted with him many more times than that. This seems
8 relatively consistent with the record?

9 A. It is.

02:28 10 Q. All right. And you're aware that a number of your text
11 messages were not preserved despite the policy requiring
12 preservation.

13 A. I am aware of that.

14 Q. And when did you learn that your texts were not preserved?

02:29 15 A. Sometime after we received the results back. I was the one
16 that actually initially requested all the text messages. And
17 when we got the request back, found that there was a gap in the
18 text messages and realized that all of mine weren't there.

19 Q. Do you remember when you made that request?

02:29 20 A. I don't.

21 Q. Can you give me the approximate year? Was it in 2018, or do
22 you think at the outset of this case?

23 A. I know that it was within several days to weeks of the
24 defense's request to obtain those messages. So whenever that
02:29 25 date was.

1 Q. Okay. It was sometime after the defense made the request
2 though.

3 A. That's correct.

02:29

4 Q. And did you request just your texts or the texts of other
5 agents as well?

02:30

6 A. I think I met the requirement at the time which was to
7 request text messages between agents -- any agents that had any
8 contact with the informants was the request at the time, if I
9 remember correctly. Whatever the original request was from the
10 defense, I fulfilled that obligation.

11 Q. Now, I'm going to show you what's previously been admitted
12 as Exhibit H. If you could just read that to yourself for a
13 moment.

14 (Witness peruses document.)

02:30

15 BY MR. ALBEE:

16 Q. And is that policy that's outlined in that December 11
17 letter that is Exhibit H, is that policy consistent with your
18 understanding?

19 A. It is.

02:31

20 Q. And where does that requirement of the United States
21 Department of Justice that e-communications be preserved, where
22 does that originate from?

23 A. Where does the policy originate from?

02:31

24 Q. Yeah. I mean, you said this is consistent with your
25 understanding of the policy. The letter itself doesn't identify

1 a particular source for that policy. I'm wondering if you could
2 tell me, is that from a DOJ memo? An AG manual?

3 A. I'm not sure of the originating policy. I just know when
4 we're issued a device, a computer or phone, we're told there's
02:31 5 no expectation of privacy; that these communications are going
6 to be maintained at an enterprise level. So I made the
7 assumption that my text messages are maintained at an enterprise
8 level. So it didn't even cross my mind to preserve my own
9 individual text messages.

02:32 10 Q. Have you done that in the past?

11 A. I have not.

12 Q. How long have you been an FBI agent?

13 A. 16 years.

14 Q. So were texts -- I don't know, were texts around 16 years
02:32 15 ago? I think so. But when -- during your entire history have
16 texts been automatically preserved?

17 A. Yes, that's correct. I've actually never had to give my
18 text messages. I've had to give my written notes, but never
19 text messages before. So it never occurred to me to safeguard
02:32 20 my own text messages.

21 Q. So at no time did you take any screenshots of your text
22 messages?

23 A. I did not.

24 Q. All right. And did you ever memorialize them in any rough
02:32 25 notes?

1 A. Not in any form or fashion.

2 Q. And I take it that you didn't give any direction to your
3 fellow agents to preserve their texts because you believed that
4 that was happening automatically for them as well.

02:33 5 A. That's correct. That subject never came up.

6 Q. Now, are you -- you indicated earlier that you weren't aware
7 of the content of your fellow agents' texts. Let me just ask
8 about a couple particular texts to see if it refreshes your
9 recollection.

02:33 10 Are you aware of Agent Zuraw texting CHS-1, Steve --

11 MR. TAIBLESON: Objection. We'd like to see the
12 exhibit, please. And if he doesn't have that in front of him,
13 of course, he can't know what agents are all sent.

14 THE COURT: Well, let's wait till the question is out.

02:34 15 MR. TAIBLESON: I'm sorry, Judge.

16 BY MR. ALBEE:

17 Q. Information about the possibility of immigration benefits?

18 A. I know that the agents were texting the informants. They
19 were both kind of younger, kind of of the generation that
02:34 20 preferred to text to communicate.

21 But the guidance was to always make it very logistical
22 in nature, where to meet, when to meet. We did have specific
23 conversations saying don't do anything substantive over text
24 message. I believe we had to take training that also states
02:34 25 that.

1 Q. All right. So if there -- if -- would you agree that a
2 discussion about immigration benefits would be something
3 substantive?

4 A. Yes.

02:34 5 Q. And so, if that's -- if there are text messages on that
6 subject, that would be contrary to instructions you gave in this
7 case.

8 A. If it was promising something and not just a -- I'd have to
9 see it to be able to definitively say whether it was or was not.
02:35 10 If you had one in particular I'd be happy to review it.

11 Q. And were the informants in this case told to record every
12 contact they had with Mr. Hamzeh?

13 A. When feasible, absolutely. We wanted to try to have every
14 conversation recorded that was possible.

02:35 15 Q. And were the informants told that?

16 A. They were.

17 Q. Were the informants told to delete the messages from the
18 agents?

19 A. I did not give any instructions to delete messages to any
02:35 20 agent or any informant.

21 Q. Would that be appropriate to tell the informant to delete
22 messages?

23 A. The only instance I could think of where that would be
24 appropriate is if we were texting them an instruction to meet
02:36 25 before or after we would -- it wouldn't be uncommon to say

1 delete this message so that the target of the investigation
2 doesn't see the text message and look at it and say why are you
3 meeting somebody right after this or before this.

4 So just for operational security reasons, but not --
02:36 5 which is precisely why we didn't want to have any substantive
6 information sent via text message, so you couldn't delete
7 anything substantive.

8 Q. Would it be substantive in your view if a CHS asked about
9 getting additional financial benefits for his work?

02:36 10 A. Again, I'd prefer to see the text if -- to make a comment on
11 that. I would have to see it in context.

12 Q. Now, about the text message records that we have, appear to
13 show you texting on a number of occasions with CHS-2 or Mike.
14 Did you also text with CHS-1, Steve?

02:37 15 A. I don't recall texting CHS-1. I was not the primary handler
16 of CHS-1. So it would have been uncommon for me or out of the
17 ordinary for me to do that. To answer your question, I don't
18 recollect ever texting CHS-1.

19 Q. Did you ever call or text Steve's wife?

02:37 20 A. No.

21 Q. If there is a call or a text to that phone number it's
22 likely that was for the purpose of contacting Steve?

23 A. I don't recollect ever talking to a wife or a girlfriend.

24 Q. Were you ever asked to determine how many texts that you had
02:38 25 either sent or received from the informants in this case?

1 A. Can you ask that again?

2 Q. Yeah. Were you ever asked to determine how many texts you
3 had sent or received with the informants in this case?

4 A. No.

02:38 5 Q. You weren't asked to take a look at the toll records, for
6 example? For your phone?

7 A. No.

8 Q. Have you seen the toll records for your phone? Let me ask
9 it a different way. Did the government, to your knowledge, ever
02:38 10 obtain those toll records for your phone?

11 A. I don't know if they obtained my call records. I know that
12 my text records, of course, were obtained.

13 Q. Did the government obtain those text records or is it your
14 understanding that those are the ones that came from the
02:38 15 defense?

16 A. No, we obtained them and provided them to you. So I saw the
17 text messages.

18 Q. We're talking past each other.

19 A. Okay.

02:39 20 Q. The actual text messages that were recovered, those were
21 what were provided to us.

22 A. Okay.

23 Q. And that you obtained, correct?

24 A. That's correct.

02:39 25 Q. And I was just asking about the toll records themselves like

1 you would get from the telephone company that show from your
2 phone everybody you called or texted. Do you know whether the
3 government ever obtained --

4 A. I do not know. I did not request my toll records.

02:39 5 Q. When did you first become aware that texts were not being
6 automatically preserved?

7 A. When we got the results back and they said text messages
8 were missing. We went back and thought it was just an oversight
9 or some sort of a clerical input error that we need to go back
02:39 10 and there's a gap, we need to get them.

11 And then when we went back the second time and were
12 told you're not -- they're not there, we don't have them, that's
13 when I first learned of it.

14 Q. At the time of the investigation of Mr. Hamzeh before his
02:40 15 arrest you had an Android phone?

16 A. That's correct.

17 Q. And how long did you keep that phone that you were using at
18 that time?

19 A. I don't know.

02:40 20 Q. Do you sign some kind of receipt or get some kind of receipt
21 when you turn in a phone?

22 A. We do.

23 Q. And so there would be a record of when you turned in that
24 phone?

02:40 25 A. I would think so.

1 Q. And I take it you're always required to turn in a phone to
2 get a new phone.

3 A. We are.

4 Q. Would you have done any investigative work using your
02:40 5 personal cell phone in this case?

6 A. I don't have a personal cell phone.

7 Q. In July of this year you were asked to write a report?
8 Write a report in this case in July 2018?

9 A. (No response.)

02:41 10 Q. Let's me ask it this way. Do you recall preparing a
11 one-page report in approximately July of 2018, in this case?

12 A. If it's an email you're referring to where I sent to the
13 supervisor regarding my interaction with the informant? If
14 that's what you're speaking about, yes.

02:41 15 Q. It is.

16 A. Okay.

17 Q. My apologies. I didn't realize it began with an email.

18 Let me show you Exhibit G, Agent Adkins. Have you
19 seen this actual report before?

02:41 20 A. I have not seen this report.

21 Q. Okay. Take a moment to read it to yourself. My question's
22 going to be: Does this appear to be the email that you sent?

23 (Witness peruses document.)

24 A. Yeah, this is almost a word-for-word transcription of the
02:42 25 email that I sent to the acting supervisor.

1 BY MR. ALBEE:

2 Q. Okay. And this was in response for a request for specific
3 information about the text messages?

4 A. That's correct.

02:42 5 Q. Now, in this email you indicate that you -- every time you
6 met with the CHS you would tell them to ask open-ended questions
7 such as who, what, when, where, and why?

8 A. That's correct.

9 Q. Had you previously been asked by the U.S. Attorney's Office
02:43 10 to give them -- or to identify for them all instructions that
11 you had given to the informants in this case?

12 A. I believe that was part of the discovery process, any
13 paperwork documenting instructions to informants.

14 Q. Okay. And this information hadn't been provided at that
02:43 15 time, correct?

16 A. Not in this form.

17 Q. Well, are you aware of any other report in which you
18 indicated that you told the informants each time to ask
19 open-ended questions such as who, what, when, where, and why?

02:43 20 A. No. At no other time did I do that. That I'm aware of.

21 Q. Did Mike, always follow those instructions?

22 A. No, he did not. There were on a couple of occasions
23 where -- actually, one time I had to admonish him. He had sent
24 me some memes, some like politically -- they were political
02:44 25 memes, and he had sent them to me on my texts and I had to

1 instruct him to not send me -- we're not friends, we're -- it's
2 a professional relationship and this texting back and forth
3 needs to be strictly logistical in nature and not have any -- it
4 needs to be strictly professional in nature.

02:44 5 Q. On how many occasions did he send you memes?

6 A. He probably sent me three or four.

7 Q. And when was that?

8 A. It must be during the time we don't have text messages,
9 otherwise I would be able to provide them to you. So it must
02:44 10 have been during that. I'm assuming it's during the gap of time
11 where we don't have text messages or we would have been able to
12 provide them.

13 Q. Can you recall specifically the content of any of these
14 memes?

02:45 15 A. They were political figures, like -- involving like the
16 current speaker of the house or the current president. They
17 were political memes. They were not professional. And so I
18 instructed the source to no longer send those to me and he
19 complied.

02:45 20 Q. Did you text him to not do that?

21 A. No, I did it in person.

22 Q. But you didn't write any report about that until this email.

23 A. Correct.

24 Q. Did you give him other instructions about texting?

02:45 25 A. Just every time we would meet it was always: "Don't send

1 anything substantive in a text. We'll talk about it and then
2 we'll memorialize it in a report where it belongs."

3 Q. And why is it that you didn't want substantive matters
4 included in texts?

02:46 5 A. Because they can be taken out of context. They can be
6 matters that are misunderstood. There's a number of reasons.

7 In addition to in my training we're told to not do
8 substantive communications via text message because that's just
9 not how we do business in the bureau.

02:46 10 Q. Now, in terms of the instruction that you gave him every
11 time about only asking open-ended questions such as who, what,
12 when, where, and why, were you aware of him violating those
13 instructions?

14 A. No. No. They both did a pretty good job about that. The
02:46 15 situation changed so -- the case situation changed so
16 drastically so many different times that we were always trying
17 to figure out what is going to happen next.

18 So it was very pertinent to ask the questions who,
19 what, when, where, and why so we knew what the next change in
02:47 20 plan was going to be.

21 Q. Are you aware of any violations of those instructions?

22 A. I can't think of any off the top of my head.

23 Q. You did advise the CHS Mike that he should text you while
24 meeting Mr. Hamzeh if he needed something?

02:47 25 A. Uh-huh.

1 Q. Yes?

2 A. Yes.

3 Q. Now, you recall that between December 14th and January 19th,
4 there were no recordings of any meetings between Mike and
02:47 5 Mr. Hamzeh?

6 MR. TAIBLESON: Objection. Beyond the scope of this
7 hearing.

8 MR. ALBEE: Ask about texts during that time.

9 THE COURT: I'll give a little leeway. Overruled.

02:48 10 THE WITNESS: I'd have to look at a report to know the
11 exact dates. If you say that's true then I would have to -- I
12 don't know that to be true, I'd have to look at the --

13 BY MR. ALBEE:

14 Q. Sure.

02:48 15 A. -- the recordings.

16 Q. Do you recall a lengthy multi-week period, though, where
17 there were no recordings --

18 A. I do.

19 Q. Yet you were aware that Mike during that time was continuing
02:48 20 to meet regularly with Mr. Hamzeh.

21 A. I was aware of that.

22 Q. And wasn't the instruction that he was to record those
23 meetings?

24 MR. TAIBLESON: Objection. Beyond the scope of this
02:48 25 hearing. He said he didn't give substantive instructions by

1 texts, so I don't see how that question can be getting at
2 something that is relevant to this hearing.

3 THE COURT: Mr. Albee?

4 MR. ALBEE: Next question will get into whether there
02:48 5 are texts, to tie this up and address the absence of recordings.

6 THE COURT: Well, he's already testified that the
7 instruction was to record those meetings. So I'll sustain that
8 objection.

9 Ask your next question.

02:49 10 BY MR. ALBEE:

11 Q. So were you concerned then about this absence of recording
12 during that period of time?

13 MR. TAIBLESON: Objection. Same reason.

14 THE COURT: Sustained.

02:49 15 BY MR. ALBEE:

16 Q. Did you try to address the absence of recordings with Mike
17 through any texting?

18 A. No.

19 Q. Would he text you when he was meeting with Mr. Hamzeh?

02:49 20 A. They worked together so he was seeing them near daily. And
21 just because we didn't have a recording didn't mean that we
22 weren't getting valuable information on what is going on. It
23 just wasn't recorded. It was in a report, a report that the CHS
24 would come back and we'd debrief with them and then we would
02:50 25 make a report.

1 So there were many reports where there wasn't a
2 recording. We didn't have a recording every time they met.
3 That wasn't feasible. Especially since they were working
4 together and the other informant was his best friend, so they
02:50 5 were together quite a bit.

6 Q. So would -- what was the nature of the texts that Mike was
7 sending you during this period of time, let's say, early January
8 up to January 19th?

9 A. I'd have to see them. I can't imagine there would have been
02:50 10 much. It would have been very logistical in nature like when
11 are we going to meet next.

12 I mean, we would still meet with the informants
13 regularly, even if we didn't have a recorded meeting between
14 Mr. Hamzeh and the informants. So we would -- we still were
02:50 15 meeting with them. But I guess, I'm sorry, maybe I don't
16 understand your question.

17 Q. Well, if there weren't recordings then you're relying just
18 on what Mike tells you, correct?

19 A. Correct. Not just Mike but also Steve.

02:51 20 Q. Special Agent Adkins, let me give you Exhibit A. I'll
21 invite your attention to -- it's the last three or four pages.

22 Do you recognize those as the -- actually that's not
23 what I want you to look at. I apologize.

24 Do you recognize those as the texts that were
02:51 25 produced, correct?

1 A. I do.

2 Q. And those came after October -- after sometime in October
3 there were no more texts that were available.

4 A. That's correct.

02:52 5 Q. All right. Let me invite your attention to page 2 of
6 Exhibit A.

7 MR. ALBEE: And, Judge, later on we're going to call
8 Ms. Caygill to discuss how she compiled these numbers, but I did
9 want to just ask Agent Adkins about the texts in January.

02:52 10 MR. TAIBLESON: I just want to be clear, which Bates
11 stamp page are we looking at?

12 MR. ALBEE: It's page 2 of Exhibit A, or just
13 summarizes the texts from January.

14 BY MR. ALBEE:

02:52 15 Q. And so these texts from beginning on January 4th through
16 January 18th, as you indicated there's not a lot of them. Do
17 you recall what was being texted during that time during that
18 time?

19 A. I don't.

02:53 20 Q. Did you make an effort to recreate any of the texts from
21 January, by looking at when the texts were sent or received and
22 looking at what else was going on?

23 A. And try to fill in the gaps on what is missing?

24 Q. Yes.

02:53 25 A. I did not.

1 Q. Did you do that for any other month?

2 A. I did not.

3 Q. And do you recall whether you texted him about the failure
4 to record any of the conversations?

02:53 5 A. I don't recall.

6 Q. Who made the determination whether you would record?

7 A. It depended a little bit on what was going on; how much
8 notice we had; when it was happening; where it was happening.

9 If we could have -- if both CHSs were at the same
02:53 10 event we were a little less concerned about recording because we
11 had two independent sources reporting about the same event. And
12 so we felt pretty comfortable that we could get exactly what
13 happened.

14 Neither one knew the other was an informant until very
02:54 15 late in this investigation. So if they were both at the same
16 event, that played part of the factor. There was a multitude of
17 reasons. But we did -- whenever there was something big, we
18 felt like there was a discussion, a plot occurring or a change
19 in plan, we made every effort to get that recorded.

02:54 20 Q. During this January period, do you recall one way or another
21 whether Mike would have texted you about the Masons?

22 A. I don't remember whether he sent me a text or a call. He
23 certainly did contact me and let us know that there was a change
24 in direction, but I don't recall whether it was a text or a
02:55 25 phone call.

1 Q. Would there have been a text in either direction between you
2 and Mike regarding machine guns? And I'm talking about the pre
3 January 19th period.

4 A. I don't recall getting a text from him regarding guns or --
02:55 5 again, every time I met with him in person I gave him the same
6 instructions. And it was -- it's the same instructions I've
7 been giving to informants my whole career. It's: I want you to
8 do -- to ask the questions of who, what, when, where, and why.

9 We're tasking you to meet with this -- the subject of
02:55 10 this investigations, so I'm tasking you to do this, I want you
11 to ask who, what, when, where, and why.

12 And I've been doing that my whole career. And I've
13 been giving the same instructions to let's not send any
14 substantive information via text message; let's talk in person
02:56 15 so we can figure out what happened and then we'll get it on a
16 report.

17 And that's been based on my training and based on not
18 just my Quantico training and additional training I've received,
19 but also the training I got from my training agent when I first
02:56 20 came into the bureau. So I've been doing that that way my
21 entire career. So I would have not done that differently in
22 this case.

23 Q. Who came up with the idea of obtaining machine guns from
24 a --

02:56 25 MR. TAIBLESON: Objection. Beyond the scope.

1 BY MR. ALBEE:

2 Q. -- undercover agent in Texas?

3 THE COURT: Hold on. Wait till he finishes the
4 question before you object.

02:56 5 So let me -- Mr. Albee, what's your response?

6 MR. ALBEE: And I will follow up with whether that was
7 supplied through a text by Mike.

8 THE COURT: Why don't you jump to that question.

9 BY MR. ALBEE:

02:57 10 Q. The idea of obtaining machine guns from a source in Texas,
11 was that raised by Mike in a text?

12 A. I don't recall a text message indicating such.

13 Q. Is that possible?

14 A. I don't think so because that certainly wouldn't have been
02:57 15 any instruction we gave. We early on said -- early on we
16 recognized that Mr. Hamzeh changed his plans numerous times, and
17 we were always playing catchup to what his change of plan was.
18 We always felt like we were just a tiny step behind because he
19 was constantly changing his plans. So it was very, very common
02:57 20 and just a normal course for us to say what is his new plan; we
21 have to find out what his new plan is, so ask who, what, when,
22 where, and why.

23 He changed it so many times we didn't need to give him
24 any ideas. He had enough plan ideas on his own that we were
02:58 25 just trying to figure out what they were.

1 Q. Well, Mr. Hamzeh wouldn't have been able to come up with, on
2 his own, that there would be a source of guns in Texas, right?

3 MR. TAIBLESON: Objection. Beyond the scope.

4 THE COURT: Sustained.

02:58 5 BY MR. ALBEE:

6 Q. Well, so, might you have texted Mike that he could tell
7 Hamzeh that guns would be available from Texas?

8 A. I'm not sure. I didn't instruct him to tell him that we had
9 a guy in Texas that could get him guns. I certainly didn't do
02:58 10 anything like that via text message.

11 I think later on in the investigation when -- early in
12 the investigation we were trying to determine did Mr. Hamzeh
13 have a gun. Once we felt pretty comfortable that he didn't have
14 a gun and made it clear that he wanted the informants to help
02:59 15 him obtain a gun, that's when the idea of if that's what he's
16 trying to do there might be a way to like find out what he's
17 trying to do and we might be able to set up an undercover and
18 create a sting in such case.

19 But we did not create the idea of getting a gun;
02:59 20 Mr. Hamzeh created that idea. We were just trying to react to
21 it.

22 Q. Well, were there any texts about the gun being a machine
23 gun?

24 A. I don't recall. There was not a text that I recall
02:59 25 involving a machine gun.

1 Q. And, I mean, logistically if Mike was proposing that he'd
2 bring machine guns from Texas, he had to back up that
3 suggestion, right?

4 A. Right.

03:00 5 MR. TAIBLESON: Objection. Beyond the scope.

6 THE COURT: Yeah. I mean, we're here talking,
7 Mr. Albee, about the preservation of evidence or failure to
8 preserve evidence. So let's focus on that when we ask these
9 questions.

03:00 10 MR. ALBEE: And, Judge, I understand what the Court's
11 saying, but I kinda need that as a foundation then to say
12 whether then that suggestion -- that information could have been
13 obtained through text messages.

14 THE COURT: I'm just not sure how helpful it is to
03:00 15 talk about what could have happened as opposed to what did
16 happen.

17 MR. ALBEE: But that's where the prejudice is of the
18 not having the text messages.

19 THE COURT: Well, you can ask him then if that -- but
03:00 20 focus on it in the context of -- I don't think you need to ask
21 the -- I mean, focus on what was communicated.

22 What you're trying to establish is, what I understand
23 at least, is what could have been contained in these missing
24 text messages. Correct?

03:01 25 MR. ALBEE: Yes.

1 THE COURT: That's what you're trying to determine.

2 So let's phrase the questions in that respect.

3 BY MR. ALBEE:

4 Q. And do you recall whether Mike would have texted agents to
03:01 5 see whether he could tell Mr. Hamzeh that there would be a
6 source for machine guns?

7 A. I don't recall that. A reason why that would be a problem
8 is if -- the reason we didn't want the informant to deliver or
9 sell anything or say anything that we didn't specifically
03:01 10 direct, is because then we would have to cash that check. So if
11 he said I know three females in Texas that speak Serbian that
12 can get you a machine gun, we'd have to figure out how to make
13 that happen.

14 And I didn't want to -- that's not feasible. So we
03:02 15 didn't ever -- we never instructed them to say or do anything
16 that we couldn't back up.

17 Q. But at some point he did make the representation that he
18 could have people from Texas bring machine guns.

19 MR. TAIBLESON: Objection. Beyond the scope.

03:02 20 THE COURT: Overruled.

21 BY MR. ALBEE:

22 Q. But at some point Mike did make the representation that he
23 could have people come up from Texas and provide you machine
24 guns, correct?

03:02 25 A. He did mention that, that he had spoken to Mr. Hamzeh about

1 a cousin or something from Texas. Yes, that's correct.

2 Q. And you know from the recordings that he told Mr. Hamzeh
3 that.

4 A. That's correct.

03:02 5 Q. And so he had your -- was there any texts granting him that
6 permission to make that representation?

7 A. No.

8 Q. He came up with that on his own.

9 A. He came up with that on his own. And he was admonished for
03:02 10 that.

11 Q. Is there any report regarding that admonishment?

12 A. No. It was a verbal admonishment.

13 Q. Are there other admonishments that aren't reduced to a
14 report?

03:03 15 A. Not that I recollect.

16 Q. And do you recall whether Mike texted you regarding
17 Mr. Hamzeh's rejection of the plan?

18 A. I know, again, he contacted me. I don't recall if it was in
19 a text or a phone call that he decided to change his plan. That
03:04 20 happened numerous times throughout this investigation. So,
21 again, I'm sorry, I don't recall if that was a text or a phone
22 call.

23 Q. But he'd let you know at some point that Mr. Hamzeh was no
24 longer interested in a plot against the Masonic Lodge?

03:04 25 A. That's correct.

1 MR. TAIBLESON: Objection. Beyond the scope.

2 THE COURT: Overruled.

3 BY MR. ALBEE:

4 Q. Did you have emails with the informants?

03:04 5 A. The informant was provided an email address early on. He
6 had taken a video at the shooting range, and we were trying to's
7 get that -- he was trying to get that to us. But I was not able
8 to retrieve it. So there were no actual -- there was no actual
9 email correspondence that occurred. He attempted to send an
03:05 10 email to me and I wasn't able to retrieve it, and there was no
11 follow-up and no other further emails.

12 Q. Are you aware of him emailing other agents, either of the
13 informants emailing other agents?

14 A. I'm not aware of that. I don't believe that occurred, but
03:05 15 I'm not aware of anything.

16 Q. Now, did the agents text among themselves during the course
17 of this investigation?

18 A. Yes.

19 Q. And have those texts been obtained?

03:05 20 A. The texts between agents?

21 Q. Yes.

22 A. Not that I'm aware of.

23 Q. Were you asked to obtain those texts?

24 A. I don't believe so.

03:05 25 Q. Were you asked to determine from phone records or from my

1 other source what texts occurred?

2 A. I was not.

3 Q. Do you know whether through Cellebrite of Agent Zuraw's
4 phone whether there was an attempt to obtain texts between the
03:06 5 agents?

6 A. I don't.

7 Q. You're not aware --

8 A. I'm not aware of it.

9 Q. I take it, for example, that during surveillance procedures
03:06 10 there's probably a lot of texting going on between agents?

11 A. I'm not sure. I know they primarily do their work via
12 radio. We have an interagency radio system that we use, but I'm
13 not sure if they're texting as well.

14 Q. How often did you personally text with other agents about
03:06 15 this investigations?

16 A. I couldn't tell you a frequency. Again, though, I can tell
17 you that it would have been very logistical in nature like
18 "we're going to have a meeting to discuss the new change of
19 plan" or "can you help me meet with Mike on a certain date and
03:06 20 time." They were not substantive in nature.

21 Q. Were these texts have been on a daily, near daily basis?

22 A. The logistical texts?

23 Q. Any texts at all.

24 A. They would have been as needed. As required. I mean, as
03:07 25 you pointed out earlier, there were times in this investigation

1 where there was kind of a lull in the action where we were
2 waiting for what was going to happen next. So during that
3 period we were working on other matters so there wouldn't have
4 been any texts regarding this case. Or any other
03:07 5 communications.

6 Q. And were there emails between agents -- I mean between
7 yourself and other agents about this investigation?

8 A. Yes.

9 Q. And have those emails all been collected and turned over?

03:07 10 A. I don't know.

11 Q. You weren't asked to turn over your emails regarding this
12 investigation?

13 A. I don't believe so.

14 Q. And did you also email prosecutors regularly about
03:07 15 information obtained in the case?

16 A. On a fairly frequent basis any time something changed we'd
17 keep the prosecutor updated either by phone or by email.

18 Q. In the text messages from Mike, did he express any -- this
19 may not be the perfect word -- animosity towards Mr. Hamzeh?

03:08 20 A. No.

21 Q. Were you aware of an instance when Mike -- were you aware of
22 an instance when Mike texted Agent Momocilvic seeking more money
23 in the case?

24 A. I have a vague recollection of that. I'd have to see the
03:09 25 text messages. I have a vague recollection of that. I was the

1 primary handler on Mike, so the majority of anything related to
2 Mike or any logistics related to Mike was my responsibility.

3 Q. Then would he have texted you about financial matters?

4 A. Again, we spoke primarily in person. And that was my
03:09 5 instructions to him. So he did at times ask for more money and
6 there was a reason for that. And when possible, after clearing
7 it with my supervisors and the prosecuting attorney, we would
8 get him more money. He bore a significant personal expense on
9 this case, so we were trying to get him compensated so that he
03:09 10 could afford to live.

11 Q. And were any of those money requests by texts that you
12 recall?

13 A. Not that I recall.

14 Q. In an effort to obtain the text messages in this case did
03:10 15 you talk to either of the CHSs about getting the text
16 information from their phones?

17 A. I did not.

18 Q. Did they have -- did they only use their own phones or did
19 they use FBI phones at some point?

03:10 20 A. They used their own phones. And they did -- CHS no. 2
21 replaced his phone pretty regularly. He was in the cell phone
22 business. He had a business whereby he dealt with the buying
23 and selling of cell phones, so whenever a new phone came out it
24 was not uncommon for him to get a new phone. So he pretty
03:11 25 regularly got a new phone.

1 Q. Did any agent that you're aware of use his personal phone in
2 connection with this investigation?

3 A. Not that I'm aware of.

03:11 4 Q. And was there ever any new training regarding the handling
5 of texts after the Peter Strzok matter?

6 A. I don't recall if there was any training. There certainly
7 was talk about renewed -- it brought that subject to light that,
8 you know, all of our communications are monitored; that there is
9 no expectation of privacy; you know, to not do anything via text
03:11 10 message that you wouldn't want to see the light of day.

11 So we were all -- it was certainly a good reminder. I
12 don't recall if there were any additional training requirements
13 because of that.

14 Q. So both -- the phone records reflect that both informants
03:12 15 frequently called two numbers that I believe had an address
16 associated with the FBI. Do you know the number 888-221-9575?

17 MR. TAIBLESON: Your Honor --

18 THE WITNESS: I do.

19 MR. TAIBLESON: -- is this a question about text
03:12 20 messages or about phone calls to a phone number?

21 THE COURT: We're not there yet, but let's hear the
22 answer.

23 BY MR. ALBEE:

24 Q. Do you know that phone number?

03:12 25 A. I am aware of that phone number.

1 Q. And is that an FBI number?

2 A. It is.

3 Q. Is that a landline or a cell phone?

4 A. It's a landline.

03:12 5 Q. And are you able to reach agents at that number?

6 A. You are not.

7 Q. And what's that number for?

8 A. That number is --

9 MR. TAIBLESON: Your Honor. Maybe he can ask if that
03:12 10 number is about text messages. On the off chance it's not,
11 maybe that would stay within the scope of this hearing without
12 asking him to reveal all their FBI operational information.

13 THE COURT: Overruled.

14 THE WITNESS: So that is a system by which the
03:13 15 informants don't have to be wearing a wire to record the
16 conversation between the target and the informant. It allows us
17 the flexibility of having conversations recorded without having
18 to actually have equipment on the informant to record the
19 conversation. I'm being vague only because --

03:13 20 THE COURT: That's okay.

21 THE WITNESS: Thanks, Your Honor.

22 THE COURT: That's as specific as I'm going to let it
23 go.

24 MR. ALBEE: Okay.

03:13 25 BY MR. ALBEE:

1 Q. Okay. And is the 414-221-9716 number an FBI number?

2 A. That's correct.

3 Q. Is that a landline?

4 A. It's the same process.

03:14 5 MR. ALBEE: Thank you, Special Agent.

6 That's all I have.

7 THE WITNESS: Thank you.

8 THE COURT: Any questions, Mr. Taibleson?

9 MR. TAIBLESON: Just one.

03:14 10 CROSS-EXAMINATION

11 BY MR. TAIBLESON:

12 Q. Agent Adkins, did you ever delete text messages to hide them
13 from the defense?

14 A. No, I did not.

03:15 15 MR. TAIBLESON: Thank you.

16 THE COURT: All right, Agent Adkins, you can step
17 down. Thank you.

18 THE WITNESS: Thank you, Your Honor.

19 (Witness excused at 3:15 p.m.)

03:15 20 THE COURT: Mr. Albee, does anybody need five minutes?

21 MR. ALBEE: Yeah, I was just going to ask for five
22 minutes, please.

23 THE COURT: All right. We'll give the court reporter
24 five to seven minutes, then we'll come back.

03:15 25 And you have how many more witnesses, Mr. Albee?

1 MR. ALBEE: Perhaps three.

2 THE COURT: Okay.

3 (Recess taken at 3:15 p.m., until 3:26 p.m.)

03:26 4 THE COURT: So let me ask you, Mr. Albee, how much
5 more do you think you have time-wise?

6 MR. ALBEE: We have Agent Zuraw and Agent Fraser which
7 I think will be significantly shorter. Little bit shorter.
8 Maybe not significantly. Shorter than Agent Adkins. The other
9 witness we have is Ms. Caygill who is going to lay the
03:27 10 foundation for the summaries we have --

11 THE COURT: She's from your office.

12 MR. ALBEE: Yes. The exhibits that we filed with the
13 Court with our reply memo yesterday, she prepared those doing
14 what she could to identify from the phone numbers we received
03:27 15 from the government how many text messages were for each.

16 The government, as I understand it, didn't feel it had
17 enough time to check her work, so I guess we need to present her
18 to do that

19 THE COURT: Your expectation is -- are you thinking
03:27 20 you'll be done this afternoon?

21 MR. BUGNI: I assume so, Your Honor. I think Zuraw
22 will take awhile, but Fraser shouldn't take too long. And I
23 don't know what kind of questions the government has, but it
24 probably won't take more than 10 minutes to lay the foundation
03:27 25 with Ms. Caygill.

1 THE COURT: Are both the agents local?

2 MR. BUGNI: Yes.

3 THE COURT: That was my principal concern, if we
4 weren't going to get done today. Yes.

03:28 5 MR. PTASHKIN: Your Honor, several housekeeping
6 matters. Permission to have a side bar with the defense
7 attorneys.

8 THE COURT: Fine.

9 (Discussion at side bar off the record.)

03:29 10 MR. BUGNI: Your Honor, the defense would call Task
11 Force Officer Agent Joe Zuraw.

12 THE COURT: Please come forward, Agent Zuraw.

13 JOSEPH ZURAW, DEFENSE WITNESS, DULY SWORN

14 THE CLERK: Please state your full name and spell it
03:29 15 for the record.

16 THE WITNESS: Joseph Zuraw. Last name is spelled
17 Z-u-r-a-w.

18 THE COURT: Please be seated, Agent Zuraw. Thank you.

19 DIRECT EXAMINATION

03:30 20 BY MR. BUGNI:

21 Q. Agent Zuraw, for whom are you employed?

22 A. I'm employed by U.S. Customs and Border Protection.

23 Q. How long have you worked for them?

24 A. About 13 years, sir.

03:30 25 Q. And do you currently work with the FBI?

1 A. Correct.

2 Q. And what is your role there?

3 A. I'm a task force officer assigned to the FBI on the joint
4 terrorism task force.

03:30 5 Q. And among your duties was the Hamzeh investigation?

6 A. Yes.

7 Q. And what was your role in that investigation?

8 A. My role was as a case agent, or a co-case agent I should
9 say, assisting case agents and helping with CHS coordination.

03:30 10 Q. And were you the co-lead agent in this case?

11 A. I don't know what co-lead --

12 Q. Were you in charge of the investigation?

13 A. No. I was only -- I only served in a co-case role, which
14 would be an assistant to a primary case agent.

03:31 15 Q. Who was the primary case agent?

16 A. Jonathan Adkins.

17 Q. Okay. And among your duties of coordinating with the CHSs,
18 how did you communicate with them?

19 A. Through phone call, through text message, in person.

03:31 20 Q. Any emails?

21 A. No.

22 Q. I'd like to ask you about the text messages. Did you use an
23 FBI phone to communicate with the CHSs?

24 A. No, I did not.

03:31 25 Q. What phone did you use?

1 A. I used the CBP-issued phone.

2 Q. And what does the CBP issue?

3 A. Customs and Border Protection, my employer. I'm issued a
4 government phone from them.

03:31 5 Q. Okay. And did you also use your personal phone?

6 A. No.

7 Q. Okay. Do you have a personal cell phone?

8 A. I do.

9 Q. And did you text with the informants on that phone?

03:31 10 A. On my government-issued phone, yes.

11 Q. That was it. And what's the phone number for that
12 government-issued phone?

13 A. 414-232-1814.

14 Q. And among the text messages that you would send with the
03:32 15 agent or with the informants, what were some of the texts that
16 you would send to them?

17 A. To who?

18 Q. To the informants.

19 A. To the informants? It was almost exclusively logistical.

03:32 20 It was meet at this place at this time.

21 Q. And what else?

22 A. Nothing of an operational nature. Just purely logistical
23 planning, go to this place, meet at this place.

24 Q. And did you speak to them about some of their benefits in
03:32 25 this case?

1 A. Through text message, yes.

2 Q. And what were those benefits?

3 A. I was working on what's called deferred action for one of
4 the CHSs.

03:32 5 Q. And what is deferred action?

6 A. Deferred action allows for a foreign national who is either
7 overstayed or is otherwise removable from the United States, to
8 be allowed to remain in place while assisting.

9 Q. And what was your involvement in that?

03:33 10 A. My involvement was to collect immigration-related
11 information from the source, from the CHS, and forward that to
12 the FBI who would prepare that written request for deferred
13 action.

14 Q. And do you know if that written request was made?

03:33 15 A. Yes, it was.

16 Q. Do you know when it was made?

17 A. I don't remember off the top of my head, no.

18 Q. Do you have a guess?

19 A. It would have been -- my best guess would be late -- late
03:33 20 2015.

21 Q. And was the coordination for some of these immigration
22 benefits, was that done through text message?

23 A. No. That would have just been me communicating with the
24 source saying I need a copy of your passport or I need to see
03:33 25 your passport specifically. I remember that text message --

1 Q. Okay.

2 A. -- asking for the documentation. And then forwarding to the
3 FBI.

03:34 4 Q. Did you coordinate this, the gathering of documents, through
5 email?

6 A. (No response.)

7 Q. How did he get these documents to you?

8 A. How did who get the documents to me? The CHS?

9 Q. Steve.

03:34 10 A. Steve. In person. When we met he had his passport. I
11 reviewed it, I took a picture of it, and forwarded the
12 information onto the FBI.

13 Q. And was there coordination over text message about payment
14 for his services? Steve I'm talking about.

03:34 15 A. There was. Yes. Yes, there was.

16 Q. And what was the nature of that?

17 A. The nature of that was a text message from me to him saying
18 that I would have an agent in contact with him, and try to get
19 him money for a hotel.

03:34 20 Q. How often did you try to secure payment for Steve?

21 A. I believe maybe twice at best that I remember, that I was
22 involved with.

23 Q. And when you were coordinating that did you text with Steve?

24 A. About what we just discussed, yes, that I was going to try
03:35 25 to have another agent contact him to work out how he would get

1 paid or where and when.

2 Q. And do you know who that other agent was?

3 A. Special Agent Mike Buono.

4 Q. Okay. And do you know if he coordinated with Steve through
03:35 5 text message?

6 A. Yes.

7 Q. Okay. And was there coordination through text message to
8 get payment after the case was over?

9 A. No.

03:35 10 Q. Was there coordination through text message for immigration
11 benefits after the case was over?

12 A. Not that I recall, no.

13 Q. After Mr. Hamzeh's arrest what text messages did you share
14 with Steve?

03:35 15 A. I believe it was just how are you doing. More logistical
16 things. Where are you. How's everything going. That kind of
17 thing.

18 Q. And how often did you have those kinds of conversations with
19 him?

03:36 20 A. Every couple days.

21 Q. Okay. And did he text you about any mental health concerns
22 through the text messages?

23 A. Did who?

24 Q. Steve.

03:36 25 A. Steve text me about --

1 Q. His mental health concerns.

2 A. No.

3 Q. Did you express your concern for his mental health through
4 text message?

03:36 5 A. Not that I recall, no.

6 Q. And, Agent Zuraw, when did you give up your phone to have a
7 Cellebrite extraction done?

8 A. Roughly a year ago.

9 Q. So roughly -- so December-November of 2017?

03:36 10 A. Yes. I don't have the exact date. But in talking with
11 another agent who knows of that being done, he said it was just
12 about a year ago.

13 Q. And who was the other agent that you spoke with?

14 A. Special Agent Neil Lee.

03:37 15 Q. And did Special Agent Neil Lee, did he conduct the
16 extraction?

17 A. No, he did not.

18 Q. Do you remember who it was that conducted the extraction?

19 A. Matthew Peterson. He's a retired FBI agent.

03:37 20 Q. And do you remember asking them -- telling them specifically
21 what they were supposed to extract from the phone?

22 A. I remember asking for specific phone numbers that I knew at
23 the time that we had maintained.

24 Q. Okay. And did you ask for any text message between yourself
03:37 25 and CHS-2, Mike?

1 A. I don't believe so.

2 Q. And do you still have the same phone that you had while you
3 were texting with Steve and Mike?

4 A. I have the physical device, but it's not on DHS network any
03:37 5 longer. I have a new phone that was issued to me. And in that
6 process, expecting that there would be some questions about the
7 content or those text messages, I asked my agency, please let me
8 keep this phone in my possession. That way it's available if we
9 need it down the road. Instead of any alternatives to that.

03:38 10 Q. Okay. And as part of this Cellebrite extraction that was
11 done a year ago, did it take an entire download of all the
12 phone's contents?

13 A. I don't know for sure. I wasn't there with them while they
14 did it.

03:38 15 Q. Okay. But were you able to look at the Cellebrite report?

16 A. Yes.

17 Q. And did you see Mike's number appear in the Cellebrite
18 report?

19 A. I don't recall seeing it in there.

03:38 20 Q. Did it surprise you that his number wasn't in the Cellebrite
21 report?

22 A. I didn't give it any thought. I was more looking for the
23 other CHS's phone number when that was requested.

24 Q. Because were you primarily handling Steve?

03:38 25 A. Correct.

1 Q. Okay. But you did text with Mike.

2 A. I'm sure I did. I don't remember a date or a time or
3 anything like that, but I'm sure over the course of the
4 investigation I did.

03:39 5 Q. And since you had your phone downloaded in November, have
6 any steps been taken with your phone to locate your text
7 messages with Mike?

8 A. I reviewed information today to double-check to see if there
9 was anything there, and there was not anything associated with a
03:39 10 phone number that we had for him at that time.

11 Q. And what did you review today?

12 A. The original dump of that phone, the Cellebrite.

13 Q. I believe, is Exhibit C up there?

14 A. I was just looking at this. You said C? Charlie?

03:39 15 Q. Yeah. Yes.

16 A. Yes.

17 Q. Okay. And could you go to the second page of Exhibit C.

18 A. I'm sorry, could I just interrupt? Is it two pages for that
19 one?

03:40 20 Q. No, it should be a composite exhibit, fairly thick with the
21 Cellebrite report.

22 A. Okay. I have a thick one that doesn't have anything on it
23 that I can see.

24 MR. BUGNI: If I can approach, Your Honor.

03:40 25 THE COURT: You may.

1 THE WITNESS: Yes, I believe that's it.

2 BY MR. BUGNI:

3 Q. You have everything?

4 A. It's got my name on it.

03:40 5 Q. That's it. And can you go to the second page of that
6 document.

7 A. Which one?

8 Q. Of the one marked "C."

9 A. Okay. There's only two pages on that one.

03:40 10 Q. Yup.

11 A. Okay.

12 Q. And that phone number, the 1814 number, do you know whose
13 number that is?

14 A. Yes, that's my phone number.

03:40 15 Q. And who is number is the 0064?

16 A. I believe that's going to be CHS-2.

17 Q. So you have no reason to doubt that this is accurate that
18 you texted with CHS-2 at these times.

19 A. No. As I said before, I'm sure over the course of the
03:41 20 investigation we had. I just don't remember specifically doing
21 that.

22 Q. Okay. And these text messages all took place in November.
23 What was happening in the investigation in November?

24 A. I don't remember off the top of my head specifically what
03:41 25 was going on then.

1 Q. Okay. Did you text about hopefully the money that Mike
2 would be getting for this?

3 A. What money that Mike would be getting?

4 Q. The payment for his work as a undercover. Or as a
03:41 5 confidential human source.

6 A. Okay. I didn't coordinate any payments with him or discuss
7 that.

8 Q. Who coordinated the payment with him?

9 A. That would have been Jonathan Adkins.

03:41 10 Q. So when he was texting you would he be texting you about
11 what Mr. Hamzeh had said at that time?

12 A. No, we didn't normally -- as a course of operations we
13 wouldn't do that. I wouldn't ask him what was said via text
14 message necessarily.

03:42 15 Again, like I said, the text messages that went back
16 and forth were primarily logistical. Anything beyond that, any
17 operational information or anything beyond logistics would have
18 been done in person.

19 Q. Would you consider giving instructions to Steve to be
03:42 20 logistical in nature?

21 A. No.

22 Q. And yet you texted him to make sure he records everything,
23 correct?

24 A. Correct.

03:42 25 Q. So not everything that you texted was logistical in nature.

1 A. I would say that it is because that wasn't necessarily an
2 operational tasking from us.

3 Q. So just for the benefit so we're not talking past each
4 other, what is the separation that you have? You have
03:42 5 operational and logistical?

6 A. Those are my own terms that I'm using here. I would just
7 say logistical is meet at this place at this time.

8 Q. Okay.

9 A. And it's not anything more specific than that. Or of an
03:43 10 operational nature which is ask about this or bring this up.
11 Those kinds of things.

12 Q. And admonishing Steve to make sure he records, that's more
13 operational or logistical?

14 A. I don't know that that would -- I don't think that would
03:43 15 necessarily be an admonishment. That would just be me saying,
16 hey, from now on we need to have everything recorded.

17 Q. And what other instructions did you give to Steve through
18 text message?

19 A. Meet at certain locations.

03:43 20 Q. Did you ever tell him to ask certain questions a certain
21 way?

22 A. Not through text message, no. That's something that would
23 have been done in person.

24 Q. Did you tell him to bring up the Masons to Hamzeh?

03:43 25 A. No.

1 Q. Did Steve -- did you text Steve to bring up machine guns?

2 A. I don't remember texting Steve to ask him to bring up
3 machine guns, no. That doesn't sound like what we would have
4 been doing through text message.

03:44 5 Q. How would that have been communicated to him?

6 MR. TAIBLESON: Objection. He didn't say it had been,
7 he just said he didn't do it by text.

8 THE COURT: Sustained.

9 BY MR. BUGNI:

03:44 10 Q. Would you have texted Mike to go to a gun range with
11 Mr. Hamzeh?

12 A. No.

13 Q. Would you have texted him to show him movies of the Masons?

14 A. No.

03:44 15 Q. And if that happened, would that have been communicated --
16 how would that have been communicated to Mike?

17 A. If I would have told him that?

18 MR. TAIBLESON: Objection, calls for speculation.

19 THE COURT: Hold on. Sustained.

03:44 20 BY MR. BUGNI:

21 Q. How were matters of the investigation communicated to the
22 CHSs.

23 A. I don't know -- in terms of what?

24 Q. Of the operational nature. Where things were going with the
03:44 25 investigation and where to guide Mr. Hamzeh.

1 MR. TAIBLESON: Objection. He didn't say they ever
2 told the CHSs to guide Mr. Hamzeh in any direction.

3 THE COURT: Well, rephrase the question.

4 BY MR. BUGNI:

03:45 5 Q. Instructions were given in this case, correct?

6 A. Yes.

7 Q. What instructions were given to the CHSs?

8 A. Ask a certain question, let the target respond, don't add
9 anything to it. It has to be their own words.

03:45 10 Q. And were there any other instructions given?

11 MR. TAIBLESON: Your Honor, does he mean by text
12 message?

13 MR. BUGNI: Well, I'm trying to lay the foundation to
14 see --

03:45 15 Your Honor, if I can respond. We know that directions
16 were given about what -- when to record and that it had to be
17 recorded. What I'm trying to find out is whether instructions
18 were given and whether or not those were contained within the
19 missing instruction -- within the missing text messages.

03:45 20 THE COURT: Well, let's focus -- I mean, I don't want
21 to get too deep into a dispute today in the context of the
22 spoliation hearing about, you know, whether the government has
23 fully and completely expressed all of the instructions that were
24 given to the CSs.

03:46 25 So let's focus on information that is, you know,

1 possibly missing because of the missing text messages.

2 BY MR. BUGNI:

3 Q. So other than instructing through text message that Steve
4 record everything, were any other instructions given through
03:46 5 text message?

6 A. No. We give -- like I said, we give the logistical
7 instructions, which I would consider that to be logistical.

8 Q. Okay.

9 A. It's not -- not more than that.

03:46 10 Q. Did Steve ever text you about what was happening between him
11 and Mr. Hamzeh?

12 A. Not that I remember, no.

13 Q. Were there text messages -- there was a fair amount of
14 surveillance done in this case, correct?

03:47 15 A. Yes, as I understand it.

16 Q. And were you part of that surveillance?

17 A. No.

18 Q. Did you help coordinate that surveillance?

19 A. I did not.

03:47 20 Q. Did you help coordinate with other agents at any time?

21 A. About what?

22 Q. About this investigation.

23 A. Yes, the other source handlers.

24 Q. And did you text with those other source handlers?

03:47 25 A. Yes.

1 Q. And when they did a Cellebrite extraction of your phone, did
2 they also grab the texts between the other agents?

3 A. I don't know. I don't remember seeing that. Again, when I
4 look through the report that was made available to me it was
03:47 5 pretty specific what he was looking for and that's -- it wasn't
6 that.

7 Q. Okay. And is the report that was made available to you the
8 same report that's in front of you, the Cellebrite extraction?

9 A. I don't know.

03:48 10 Q. Can you page through it?

11 (Witness peruses document.)

12 A. Sorry, I didn't see there was a whole report in back of it.

13 (Witness peruses document.)

14 A. It appears to be.

03:49 15 BY MR. BUGNI:

16 Q. So there was only for one phone number that the extraction
17 took place.

18 A. Of this report?

19 Q. Yes.

03:49 20 A. Yes.

21 Q. And so the one report that you saw was for that one single
22 phone number.

23 A. For my government phone, yes.

24 Q. Yes. Was one done for your personal phone?

03:49 25 A. No.

1 Q. Okay. Did you ever text any agents on your personal phone?

2 A. No.

3 Q. Did you ever text any other agents on their personal phones?

4 A. No.

03:49 5 Q. If you can go to page 17 of that report, line 84. It's
6 Bates 17, but seems to be page 5 of the actual report. Line 84.

7 Do you see it?

8 A. Yup. I do.

9 Q. Can you read that to yourself?

03:50 10 (Witness peruses document.)

11 BY MR. BUGNI:

12 Q. So this -- the bosses being upset the night before with the
13 failure to record.

14 A. Uh-huh.

03:50 15 Q. That's the context of the text message, correct?

16 A. Yes.

17 Q. Did the bosses text you that it was supposed to be recorded?

18 A. No.

19 Q. Was it emailed?

03:50 20 A. No.

21 Q. How was this conveyed to you?

22 A. This was the supervisor over our squad telling me in his
23 office.

24 Q. And who was the supervisor?

03:50 25 A. Phil Hale.

1 Q. And how many emails would you say were sent in the course of
2 this investigation?

3 A. I have no idea.

4 Q. More than a hundred?

03:51 5 A. I don't know. I don't know where to start to try to guess
6 on that. I don't know who was all involved or what people were
7 involved with it necessarily outside of Milwaukee that would
8 have --

9 Q. No, just from you.

03:51 10 A. Maybe 10. 15.

11 Q. Okay. How many emails did you receive about this case?

12 A. Probably about the same.

13 Q. Okay. And when you first -- you first started meeting with
14 Steve in August of 2015.

03:51 15 A. I believe that's correct.

16 Q. And did you have him use his personal phone to contact you?

17 A. Yes.

18 Q. Would he ever contact you with his wife's phone?

19 A. Not that I ever knew of.

03:51 20 Q. And were there any other phone numbers that he texted you
21 with?

22 A. Not that I remember, no.

23 Q. And if he had texted you from another number it wouldn't
24 have shown up on the Cellebrite report.

03:52 25 A. No, this was for his number specifically, I believe.

1 Q. And before Mr. Hamzeh became a target in this investigation,
2 how often would Steve text you?

3 A. Before the defendant -- can you say that again? I'm sorry.

4 Q. So when was your first contact with Steve?

03:52 5 A. When was my first contact? I believe roughly August.

6 Q. Okay. And the first contact or first report about

7 Mr. Hamzeh takes place on September 16th.

8 A. Correct.

9 Q. Okay.

03:52 10 A. I think.

11 Q. So what I'm asking is, within that five-week period were
12 text messages sent to Steve from you?

13 A. It's possible, but I don't remember specifically texting him
14 in-between there.

03:52 15 Q. Okay.

16 A. He came into the office and we talked. And we exchanged
17 phone numbers and made -- kinda kept contact that way, through a
18 phone call.

19 Q. How many phone calls do you believe you talked to him with?

03:53 20 A. I don't know.

21 Q. Okay. And when he first introduced Mr. Hamzeh as a subject,
22 was it through text message?

23 A. No.

24 Q. How did he approach that?

03:53 25 A. In person.

1 Q. And did you have an email address for Mr. -- Steve?

2 A. I don't remember.

3 Q. And as far as the preservation of these texts, you mentioned
4 earlier that you kept your DHS phone, correct?

03:53 5 A. Correct.

6 Q. So a Cellebrite analysis could be done today to retrieve the
7 missing text messages.

8 A. It's possible.

9 Q. Okay. Has the government approached you since the November
03:53 10 download that they did to try and retrieve those text messages?

11 A. No, I brought the phone back to them.

12 Q. And those text messages or potential text messages between
13 Steve in August, what were they concerned about as far as
14 Hamzeh? When was Hamzeh first brought up?

03:54 15 A. I don't remember a specific date, but that was the reason
16 for his initial contact to us.

17 Q. And where was that recorded?

18 A. I'm not positive. Perhaps the case file.

19 Q. And do you remember -- so he walked in and told you about
03:54 20 Samy Hamzeh?

21 A. That's correct.

22 Q. In August.

23 A. Approximately.

24 Q. And the first report about Hamzeh is not generated until mid
03:54 25 September?

1 A. I don't know when the first report was generated.

2 Q. If I told you it was -- go ahead.

3 A. What report are you -- what report do you mean specifically?

4 Is there a report?

03:54 5 Q. There is a report of September 16th written by you.

6 A. Okay.

7 Q. It's CHS-1. But were there other reports written by you
8 about your contacts with Mr. Hamzeh -- or, sorry, with Steve in
9 August?

03:55 10 A. Not that I remember. That's why I'm asking what the nature
11 of that report was. If that was a CHS report, if that was
12 something else, I don't know.

13 Q. What other reports could there be?

14 A. A report of an interview.

03:55 15 Q. And do you believe that a report of an interview was made
16 between you and Steve?

17 A. I don't remember.

18 Q. And would the text messages at times would be used as almost
19 your rough notes, correct?

03:55 20 A. No.

21 Q. Did you ever use the text messages to produce a report?

22 A. The text messages, no.

23 MR. BUGNI: If I can just have a second, Your Honor.

24 THE COURT: Yes.

03:55 25 (Brief pause.)

1 BY MR. BUGNI:

2 Q. Do you recognize this report?

3 A. Yes.

4 Q. Who wrote this report?

03:56 5 A. I did.

6 Q. And in this report, how often would you write reports in
7 this case?

8 A. Just about every time we met.

9 Q. Every time you met with whom?

03:56 10 A. With the CHS.

11 Q. So every time you met with the CHS you produced a report.

12 A. Yes.

13 Q. As well as with phone contact too?

14 A. If the two were -- if it was discussing the same thing or if
03:57 15 it was the same information being passed, then, no, not
16 necessarily. It wouldn't always be one for one and that would
17 be the difference, I guess.

18 Q. Okay. But what became the -- the decisionmaker between
19 whether or not you wrote a report about a phone call?

03:57 20 A. I'm sorry?

21 Q. When you said that you would write a report about every
22 contact you had with him, but sometimes if it was about the same
23 subject matter you didn't.

24 A. Correct. If I was -- if I received a text that I can't meet
03:57 25 today, and I made a follow-up phone call and said what's going

1 on, is everything okay, is there anything I need to know about,
2 I wouldn't document the text message and then the phone call in
3 individuals reports. That's what I mean when I say it's not one
4 for one.

5 Q. Got it.

6 A. He texted me, he called me, I called him.

7 Q. I understand now. And so any time there was a phone call
8 there would be a report written.

9 A. No, not always.

03:58 10 Q. Okay. When would there not be a report written? Other than
11 if it was duplicative of the text message.

12 A. If there was a contact where he would say merry Christmas or
13 something not related to the case.

14 Q. And did you have daily contact about the case?

03:58 15 A. No.

16 Q. How often would you have contact about the case?

17 A. Every few days. There was nothing set up where we contact
18 each other every 72 hours or anything like that, for example.
19 It was just as information is coming or going.

03:58 20 Q. But you would often meet on Tuesdays, correct?

21 MR. TAIBLESON: Objection. Beyond the scope of the
22 hearing.

23 MR. ALBEE: It's in the text messages.

24 MR. TAIBLESON: I don't understand how this is

03:58 25 relevant to spoliation.

1 THE COURT: Sustained.

2 BY MR. BUGNI:

3 Q. Returning back to the report that's been marked Exhibit L.

4 In the middle of that report it lists the type of contact,

03:58 5 correct?

6 A. Yes.

7 Q. And underneath that it says "SMS."

8 A. Yes.

9 Q. So, in fact, you would have wrote a report based upon text

03:59 10 messages.

11 A. What I said earlier was "not always," no.

12 Q. Not always, but there are times when text messages would

13 provide a basis to write a report.

14 A. Potentially, yes.

03:59 15 Q. And the text message itself would become your rough notes

16 about what you're about to base the report upon.

17 A. No.

18 Q. What would be your rough notes at that point to write this

19 report?

03:59 20 A. If I took rough notes it would be the rough notes. If it
21 was a text message and I had a question about it, likely as this
22 one would have been, I would have just made a phone call instead
23 of texting back and forth.

24 Q. And would you fill in your rough notes with your text

03:59 25 messages?

1 A. I don't know what you mean.

2 Q. So if there's a gap in the rough notes that you had taken,
3 would you refer to your text message to see what was missing?

4 A. No.

03:59 5 Q. To clarify something?

6 A. No.

7 MR. BUGNI: If I could have one more second,
8 Your Honor.

9 THE COURT: Yes.

04:00 10 (Brief pause.)

11 MR. BUGNI: No further questions, Your Honor.

12 THE COURT: Mr. Taibleson?

13 CROSS-EXAMINATION

14 BY MR. TAIBLESON:

04:00 15 Q. Did you ever delete anything to hide it from the defense?

16 A. No.

17 MR. TAIBLESON: Thank you.

18 THE COURT: Thank you, Agent. You may step down.

19 (Witness excused at 4:00 p.m.)

04:00 20 THE COURT: Another witness from the defense?

21 MR. BUGNI: Yes, Your Honor. The defense would call
22 Agent Eric Fraser.

23 THE COURT: Raise your right hand.

24 ERIC FRASER, DEFENSE WITNESS, DULY SWORN

04:01 25 THE CLERK: Please state your full name and spell it

1 for the record.

2 THE WITNESS: My name is Eric Parker Fraser. E-r-i-c,
3 P-a-r-k-e-r, F-r-a-s-e-r.

4 THE COURT: You may be seated. Thank you, Agent.

04:01 5 DIRECT EXAMINATION

6 BY MR. BUGNI:

7 Q. Agent Fraser, with whom are you employed?

8 A. I'm currently employed with the FBI.

9 Q. How long have you been employed there?

04:01 10 A. Just over 10 years.

11 Q. And what you are your duties there?

12 A. I'm currently a special agent assigned to the criminal
13 enterprise squad.

14 Q. And in 2015 and 2016, were you involved in the Samy Hamzeh
04:01 15 case?

16 A. I was.

17 Q. And what was your role in that case?

18 A. I was another agent on the squad working with the
19 investigation over those couple months.

04:01 20 Q. And who was the lead agent in that case?

21 A. That would be Jonathan Adkins.

22 Q. And would he -- he was the person in charge for coordinating
23 everything?

24 A. He was the primary case agent for the case, correct.

04:02 25 Q. And part of him being the primary case agent and

1 coordinating everything is to communicate with other agents,
2 correct?

3 A. Yes.

4 Q. And sometimes that was done through email?

04:02 5 A. Yes.

6 Q. And sometimes that would be done through text message.

7 A. Yes.

8 Q. And were these text messages -- let me ask you this. Do you
9 have a government phone?

04:02 10 A. Yes.

11 Q. And that's issued by the FBI?

12 A. Correct.

13 Q. And what kind of phone is that?

14 A. Currently we have the Samsung S7.

04:02 15 Q. And when was that issued to you?

16 A. That was probably the summer of 2016.

17 Q. So after this case. And what kind of phone did you have
18 during Mr. Hamzeh's case?

19 A. Pretty sure it was a Samsung S5, the previous model.

04:02 20 Q. And did you also have a personal cell phone?

21 A. Yes, I did.

22 Q. And would you text with agents on that phone?

23 A. No.

24 Q. So all the text messages that you sent in this case were
04:03 25 through your work phone.

1 A. Correct.

2 Q. And when you texted with other agents about this
3 investigation, how often would that happen?

4 A. Very seldom.

04:03 5 Q. Give me an example.

6 A. Maybe just a couple times a week.

7 Q. And would it be with the people who were coordinating
8 surveillance?

9 A. It would be with other individuals on the squad, just
04:03 10 determine their availability like for calendar purposes to see
11 who is available tomorrow or the next day or what our schedule
12 looked like for the week.

13 Q. And there were a lot of developments in this case, it's been
14 described as rapidly changing. Would the developments in the
04:03 15 case be shared over email or text?

16 A. Typically not through email or text through our work phones,
17 no.

18 Q. How would they be shared?

19 A. In the office in the environment that we all worked or
04:03 20 shared in. We were showing up for work every day and we talked
21 among ourselves with the direction from our supervisor and
22 Jonathan who was leading the case.

23 Q. And sometimes would these developments be shared through
24 email? I'm not saying exclusively or every time, but would you
04:04 25 get emails and updates about this case?

1 A. Not like developments for the case or anything through
2 email, no.

3 Q. Okay. What type of information would be shared over email?

4 A. Just like I said, our calendars, our schedules, trying to
04:04 5 coordinate if we're available for either surveillance or some
6 sort of operational activity outside of the office.

7 Q. And as the surveillance was taking place would exhibits be
8 written back and forth or text messages sent about what was
9 happening?

04:04 10 A. Not about what was happening, but about like logistically
11 where we would need to maybe be or to set up or to try and move
12 our movements. Nothing with relating to the case.

13 Q. No, but I mean what was happening as to where Mr. Hamzeh is
14 at a certain time or who he's meeting?

04:04 15 A. That would be like through our phone calls.

16 Q. Okay.

17 A. We would call each other or we would actually have our
18 radios that we would communicate with.

19 Q. At times would agents text that information?

04:04 20 A. I would assume they did. I never did.

21 Q. And when did you find out about the lack of preservation of
22 some text messages affecting FBI phones?

23 A. I imagine it would have been sometime in late '16 or even
24 '17. I don't recall the exact date.

04:05 25 Q. How did they let you know?

1 A. Just through general conversation in the office, through
2 other case agents such as Jonathan Adkins or others. Just kind
3 of word of mouth.

4 Q. I don't mean about this specific case, but about the lack of
04:05 5 preservation of text messages in the FBI generally.

6 A. Oh, I gotcha. I'm sure there was just an email I think sent
7 out to everybody a couple years ago just so everybody was at
8 least knowledgeable about whatever guidance.

9 Q. And do you remember when that email would have taken place?

04:05 10 A. It would have been a couple years ago, but I don't recall
11 exact timeframe.

12 Q. 2016.

13 A. Either '16, or '17 maybe, yes.

14 Q. And did that email give any direction to the agents of what
04:05 15 to do with their phones to make sure that text messages were
16 preserved?

17 A. If there was relevant or substantive information regarding
18 that phone or that device as far as like the text messages or
19 exhibits then yes, they provided guidance as to what to do to
04:06 20 preserve those.

21 Q. And do you remember what the guidance was?

22 A. I have actually never done it because I don't use the phone
23 for emails or texts to have any substantive information on it.
24 So I've never done it myself, but if I needed to I would look up
04:06 25 the guidance or policy and follow that.

1 Q. And so was it given to each individual agent to decide
2 whether or not they thought those text messages or emails were
3 substantive, or was that something that every email or every
4 text message is presumed substantive?

04:06 5 A. It's not necessarily presumed substantive. I think a lot of
6 it is informal just kind of work dialog or just kind of other
7 things that might be sent out amongst the office or whatever.
8 But then if there is something substantive that the agent that
9 receives it deems that that's credible that needs to go to the
04:06 10 case, then they would preserve it in the matter that they would
11 follow in the guidance and do that.

12 Q. At no point in this case did Agent Adkins approach you and
13 tell you to make sure you preserve your text messages about this
14 case.

04:06 15 A. Mr. Adkins did not, no.

16 Q. Did anybody approach you?

17 A. No.

18 Q. Did anybody attempt to do a Cellebrite extraction on your
19 phone?

04:07 20 A. On my phone? Not that I recall or not that I was aware of.

21 Q. Has anybody in the FBI or the government's office approached
22 you with your toll records and asked you how many text messages
23 you sent to Steve and Mike?

24 A. No.

04:07 25 Q. Did they ever ask you to recreate those?

1 A. No.

2 Q. Did they ever ask you to recreate the text messages between
3 the agents?

4 A. No.

04:07 5 Q. I believe I asked this but if I didn't: And nobody's ever
6 approached you to look through your cell phone to try and
7 extract that.

8 A. No.

9 Q. And do you remember, were there any meetings in this
04:07 10 specific case about the lack of preservation of the texts and
11 what could be done to recreate them?

12 A. Not that I recall, no.

13 Q. Any emails sent out?

14 A. No.

04:07 15 Q. When did you first learn that your text messages with
16 confidential human sources were missing?

17 A. Probably like a year, year and a half ago. Sometime during
18 the course of this investigation once it was closed and we were
19 working through discovery and everything here in court.

04:08 20 Q. And how did you learn that?

21 A. I'm not sure if it was exactly from the United States
22 Attorney's Office or internally like our management or something
23 knew about it and would pass it on to all of us agents that were
24 currently involved in that case at that time.

04:08 25 Q. And did you make any efforts to talk to the CHSs to see what

1 they thought you remember having texted them?

2 A. I did not have any sort of contact with any of them since
3 that case was concluded.

4 Q. In this case -- sorry, if I can have one second.

04:08 5 MR. BUGNI: May I approach, Your Honor?

6 THE COURT: You may.

7 (Document tendered to the witness.)

8 BY MR. BUGNI:

9 Q. Agent Fraser, the 414-265-6414 number, is that your phone
04:09 10 number?

11 A. Correct.

12 Q. And did you text with Steve in this case? We were calling
13 him Steve, CHS-1.

14 A. CHS-1, I'm pretty sure I did, yes.

04:09 15 Q. And you texted with him -- if you could go to page 2 of this
16 report. We've already established you're the 6414 number and
17 his would be the 6945 number.

18 A. Yes.

19 Q. These text messages took place right as Mr. Hamzeh was
04:09 20 backing out of the Masonic plot.

21 MR. TAIBLESON: Objection.

22 MR. PTASHKIN: Objection, obviously.

23 THE COURT: Sustained.

24 BY MR. BUGNI:

04:10 25 Q. Do you know what was taking place on the 23rd or 24th of

1 this investigation?

2 MR. PTASHKIN: Objection, Your Honor. Irrelevant to
3 the spoliation hearing. It seems like he's asking him to
4 recounts facts of the investigation. The substance of the
04:10 5 investigation. This has nothing to do with the preservation of
6 whether he deleted text messages in bad faith or not.

7 MR. BUGNI: It goes to whether or not what was on the
8 text messages.

9 THE COURT: Overruled.

04:10 10 BY MR. BUGNI:

11 Q. So the 23rd and 24th in this case, what was going on in the
12 investigation?

13 A. I think it was coming to a conclusion. Or it was -- I knew
14 it was ending sometime in late January.

04:10 15 Q. How do you know it was ending in late January?

16 A. I just recall that being a significant timeframe during, you
17 know, our squad work and kinda just knowing that that was a big
18 case that we, you know, were concluding in late January. So
19 three years almost now.

04:10 20 Q. And as part of the sort of culmination of this case, there
21 had been a plot to -- alleged plot to attack the Masonic Center,
22 correct?

23 A. Yes.

24 Q. And at some point Mr. Hamzeh backed out of that plot.

04:11 25 MR. PTASHKIN: Objection.

1 MR. TAIBLESON: Objection.

2 MR. BUGNI: Your Honor, we want to get to the
3 substance of what was texted between him and Steve.

4 MR. TAIBLESON: Defense counsel could ask whether
04:11 5 Mr. Fraser is aware of any text messages about a withdrawal
6 from the Masonic Center.

7 THE COURT: Let's phrase without generally talking
8 about the investigation. This isn't a deposition. We're
9 focused on what could be on these texts. So let's ask the
04:11 10 question in that fashion.

11 BY MR. BUGNI:

12 Q. You are aware that Mr. Hamzeh backed out of the plot and
13 that could have been communicated through a text message to the
14 agents.

04:11 15 MR. TAIBLESON: Leading. Calls for speculation.
16 Doesn't just ask him whether he knows if that happened.

17 THE COURT: Overruled. Go ahead.

18 BY MR. BUGNI:

19 Q. You can answer the question.

04:11 20 A. I know on the 23rd and 24th I was needing to meet with him
21 in person. So I was coordinating a lot of texts to try and
22 figure out where he was so I could talk to him about, you know,
23 what Jonathan Adkins or the nature of the case, where it was
24 going and what information he had and what he knew.

04:12 25 Q. And did he communicate what he knew through text message?

1 A. Not through text.

2 Q. Did he communicate what was happening at that moment with
3 Mr. Hamzeh through text message?

4 A. Not through text.

04:12 5 Q. Did he communicate where he saw the investigation going
6 through texts?

7 A. No.

8 Q. Did you coordinate -- after meeting with Mr. Steve, did you
9 communicate with any of the agents through texts?

04:12 10 A. At this particular date or time?

11 Q. Yes.

12 A. I talked to them over the phone when I was done meeting with
13 Steve, and I would tell them that we concluded and I would see
14 them back at the office the next day or --

04:12 15 Q. And did you communicate any information about the
16 investigation to the other agents through text?

17 A. Nothing through text.

18 Q. What about email?

19 A. Nope.

04:12 20 Q. Okay.

21 MR. BUGNI: No further questions, Your Honor.

22 THE COURT: Government?

23 CROSS-EXAMINATION

24 BY MR. TAIBLESON:

04:13 25 Q. Agent Fraser, did you ever delete anything to hide it from

1 the defense?

2 A. No.

3 MR. TAIBLESON: Thank you.

04:13 4 THE COURT: All right. Thank you, Agent Fraser. You
5 can step down.

6 (Witness excused at 4:13 p.m.)

7 THE COURT: Mr. Bugni?

8 MR. BUGNI: Your Honor, we'd call Shavon Caygill to
9 the stand.

04:13 10 SHAVON CAYGILL, DEFENSE WITNESS, DULY SWORN

11 THE CLERK: Please state your full name and spell both
12 the first and last name.

13 THE WITNESS: Shavon Caygill, S-h-a-v-o-n, last name
14 C-a-y-g-i-l-l.

04:13 15 DIRECT EXAMINATION

16 BY MR. BUGNI:

17 Q. Ms. Caygill, for whom are you employed?

18 A. The Federal Defender Services.

19 Q. And how long have you worked there?

04:14 20 A. It will be almost a year.

21 Q. As part of your duties in this case in our office, have you
22 been working on the Hamzeh case?

23 A. I have.

24 Q. And among those duties has it been to look through and sort
04:14 25 the phone records in this case?

1 A. Yes.

2 Q. Were subpoenas issued in this case for the phone records?

3 A. They were.

4 Q. All right. We've already agreed that Exhibit K is a

04:14 5 stipulation of the phone numbers. Was a subpoena issued for the
6 toll and text messages for the 6945 number?

7 A. It was.

8 Q. And who did that number belong to?

9 A. CHS-1.

04:14 10 Q. And to the 0064 number?

11 A. CHS-2.

12 Q. And as part of -- did you get certified copies of all those
13 records?

14 A. Yes.

04:14 15 Q. And approximately how big were those phone records?

16 A. In Excel sheets, over 10,000 lines; paper, a couple thousand
17 pages.

18 Q. And for Steve about the same?

19 A. Yes, for both.

04:15 20 Q. And were those records return certified?

21 A. Yes.

22 Q. And were they shared with the government?

23 A. They were.

24 Q. And as part of your duties in this case did you make

04:15 25 summaries for how many messages were shared between the CHS

1 numbers and other numbers?

2 A. I did.

3 Q. And who provided the other numbers to you?

4 A. The government.

04:15 5 Q. And based upon that did you -- how did you create your
6 summaries?

7 A. I was able to extract text messages from the main report and
8 pull them out and make a summary of just the text messages.

9 Q. So you were able to isolate the SMS messages.

04:15 10 A. Yes.

11 Q. And were you able to isolate them for each phone number?

12 A. He was.

13 Q. For Agents Fraser, Adkins, Zuraw and Buono?

14 A. Yup.

04:16 15 Q. And did you prepare the summaries A, B, C and D in this
16 case?

17 A. I did.

18 Q. And are those accurate?

19 A. Yes.

04:16 20 Q. How did you determine how many texts had been sent between
21 the agents and the CHSs?

22 A. I isolated it by phone number and counted -- I mean in Excel
23 sheets it gives you a number.

24 Q. And then how did you determine the number that were missing?

04:16 25 A. The government had provided text messages and I manually

1 counted them. Besides Officer Zuraw's was a Cellebrite
2 extraction and it gave me the number, but other than that I
3 manually counted all the text messages.

04:16 4 Q. And did you go through the same process with Exhibits A
5 through E?

6 A. Yes.

7 MR. BUGNI: Your Honor, we move in Exhibits A through
8 E.

9 THE COURT: Do I have all of those? I mean right now
04:16 10 I have A, --

11 MR. BUGNI: Sorry. We submitted them yesterday,
12 Your Honor, but we'll hand up copies that should be here.

13 THE COURT: Okay. I would like copies if you've got
14 them. So any objection to A through E did you say?

04:17 15 MR. BUGNI: Yes, Your Honor.

16 THE COURT: Any objection?

17 MR. PTASHKIN: Your Honor, the issue the government's
18 having is we think there are some inaccuracies in the summaries.
19 And some of them relate to this issue of the text messages that
04:17 20 are over the 140 characters being broken down. So I guess the
21 short answer is we object on the grounds that they aren't a
22 hundred percent accurate.

23 THE COURT: Well, there's no evidence of that so I'm
24 going to accept them. And if you want to subsequently present
04:17 25 evidence of some inaccuracy I suppose you could do so.

1 MR. PTASHKIN: Of course, Your Honor. Thank you.

2 THE COURT: So A through E will be received.

3 (Exhibits A through E received in evidence.)

4 MR. BUGNI: We have no further questions, Your Honor.

04:17 5 THE COURT: Any questions for this witness?

6 MR. PTASHKIN: No questions for this witness,

7 Your Honor, for the United States.

8 THE COURT: All right, you may step down, Ms. Caygill.

9 Thank you.

04:18 10 (Witness excused at 4:18 p.m.)

11 THE COURT: Any more witnesses from the defense?

12 MR. ALBEE: No, Your Honor.

13 THE COURT: So let me ask. I've got this exhibit
14 witness list. Who gave this to me?

04:18 15 MR. BUGNI: Your Honor, sorry, we didn't move into
16 admission the stipulation of Exhibit K.

17 MR. ALBEE: Can we hand that up?

18 THE COURT: Okay. I also have -- we've also
19 referenced today -- so K -- no objection to K, correct?

04:18 20 MR. PTASHKIN: No objection, Your Honor.

21 THE COURT: And we also today talked about G, H, L.

22 And I was given a copy of N. Have those been offered? I can
23 answer that. Nobody's offered those. Are they being offered?

24 MR. ALBEE: No, Judge. I thought at the outset -- and
04:19 25 if I didn't I apologize -- that H and N were agreed upon and

1 we've agreed to admit those. So H and N.

2 We were not moving G.

3 And -- so the ones that we would hope are admitted at
4 this point are A through E, H, K, and N.

04:19 5 MR. PTASHKIN: And no objection to that, Your Honor.
6 The United States would also move to have Exhibit G admitted
7 into evidence.

8 MR. ALBEE: We don't object.

9 THE COURT: All right. So H -- or G, H, K, and N will
04:19 10 be admitted. And I need copies of B, E, and I guess I just got
11 K.

12 (Exhibits G, H, K and N received in evidence.)

13 MR. ALBEE: Judge, in fairness to the government,
14 actually we should probably admit Exhibit I, the -- Agent
04:20 15 Mosback. E relates to his missing texts, but there are two
16 missing texts and the government provided those yesterday
17 evening. So we probably should supply Exhibit I. And I don't
18 believe there are any more missing from Agent Mosback.

19 MR. PTASHKIN: That's correct, Your Honor.

04:20 20 THE COURT: So "I" also will be received.

21 (Exhibit I received in evidence.)

22 THE COURT: Okay. And you're giving me a copy of "I."
23 So just to summarize from the exhibits. We have
24 received A, B, C, D -- I guess I still don't have E.

04:21 25 MR. BUGNI: Coming up, Your Honor.

1 THE COURT: E. G, H, I, K, and N. Okay.

2 All right. So that's the exhibits.

3 MR. ALBEE: And, Judge, I think our agreement is all
4 of those should be under seal except G and H.

04:21 5 THE COURT: All right. Well, I will -- as previously
6 indicated, I will accept -- I'll receive those under seal for
7 the time being, subject to a later determination as to whether
8 they should properly remain under seal.

9 MR. ALBEE: Actually, given a meeting I had yesterday,
04:22 10 I don't know if we should call these restricted. They can be
11 available to the parties. I guess there's a technical
12 difference there. So if they're restricted the parties at least
13 can access them as opposed to sealed.

14 THE COURT: What's the government's position on that?

04:22 15 MR. PTASHKIN: I guess that's okay, Your Honor. I
16 mean, we already have the exhibits. But, I mean, no objection
17 to them being not restricted to the parties.

18 THE COURT: They will be restricted which means the
19 parties have access to them, the public does not for the time
04:22 20 being at least.

21 So I guess the next question to you, Mr. Albee, is:
22 What do you propose as the next step?

23 MR. ALBEE: Judge --

24 THE COURT: There's no motion pending. There was a
04:23 25 motion for a spoliation hearing. So we've had that.

1 MR. ALBEE: Judge, we'd like to get the transcript and
2 then file with the Court a pleading addressing two things:
3 Whether there's any basis for any kind of spoliation sanction --
4 and I don't know that there will be or there won't be.

04:23 5 The bigger concern at this point is it's been
6 identified there are still things that aren't -- haven't been
7 produced in discovery. And that would probably -- our primary
8 focus is getting those things produced. And then I guess if
9 they still aren't produced, then we'd ask for a sanction.

04:23 10 But --

11 THE COURT: Well, I think that as to documents that
12 the defense believes have not yet been produced that have been
13 requested, you know, communicate with each other about that, see
14 if you can, you know, if there's some agreement about what
04:24 15 exists and what's been ordered produced but hasn't been. And if
16 there is still something out there that the defense takes the
17 position exists and the government has it and it hasn't been
18 produced and they're refusing to produce it, then I guess file a
19 motion.

04:24 20 MR. ALBEE: That's fine. Thank you, Judge.

21 THE COURT: And so wait till you get a transcript
22 from -- of this hearing. And if the defense believes there's a
23 basis for anything based on the testimony that's been received,
24 should we set a date for the filing of a motion for that?

04:25 25 MR. ALBEE: Yes, Judge. If we could -- two weeks for

1 the transcript. Two weeks for the transcript and two weeks to
2 file.

3 THE COURT: All right. So roughly a month out,
4 recognizing we've got holidays in there. Friday, January 18th
04:25 5 for the filing of any such motions?

6 MR. ALBEE: Yes, that would be great.

7 THE COURT: And then for response for a week?

8 MR. TAIBLESON: Week is fine, Your Honor. Thank you.

9 THE COURT: So January 25th. And a week for reply,
04:25 10 February 1st?

11 MR. TAIBLESON: Yes, Your Honor.

12 MR. BUGNI: Actually, Your Honor, Mr. Albee and I both
13 have trials in separate districts, but -- so if we could have
14 one more week. So maybe February 8th would be --

04:25 15 THE COURT: Any objection from the government?

16 MR. TAIBLESON: No.

17 THE COURT: All right. February 8th for reply.

18 Mr. Ptashkin, looks like you want to say something?

19 MR. PTASHKIN: I apologize. I guess I'm just -- I
04:26 20 think the defense requested an extra week for their initial
21 response? Or was that for the reply?

22 MR. BUGNI: For the reply.

23 MR. PTASHKIN: For the reply. The February 8th date.
24 I apologize.

04:26 25 THE COURT: No problem. Is there anything else?

1 MR. BUGNI: No, Your Honor.

2 THE COURT: From the defense?

3 MR. ALBEE: No, Judge.

04:26

4 THE COURT: All right. Then we're concluded. Thanks,
5 everybody.

6 MR. TAIBLESON: Thanks, Judge.

7 (Proceedings concluded at 4:26 p.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of my original machine shorthand notes taken in the aforementioned matter to the best of my skill and ability.

Signed and Certified December 19, 2018.

/s/John T. Schindhelm

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E X H I B I T S

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